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Supreme Court of the United States

V.R. DeANGELIS M.D., P.C., R.T. DOMINGO M.D., P.C., V.R. DeANGELIS M.D., P.C., TAX MATTERS PARTNER, VINCENT DeANGELIS, JEANETTE DeANGELIS, RODOLFO DOMINGO, BERNADETTE DOMINGO, KEITH DURANTE, KATHLEEN DURANTE, ANTHONY J. CAPIZZI, MARY ANN CAPIZZI,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals erred by summarily affirming a decision from the Tax Court, contrary to multiple and long-established precedents, holding that taxpayers' subjective intent to minimize tax liability invalidates otherwise lawful tax deductions.

PARTIES TO THE PROCEEDING

Petitioners—medical doctors and their spouses, the doctors' professional corporations, and a partnership comprised of the professional corporations—are listed in the caption. Respondent is the Commissioner of Internal Revenue.

RULE 29.6 STATEMENT

The only corporate Petitioners are V.R. DeAngelis M.D., P.C. and R.T. Domingo M.D., P.C. These two entities are S corporations that do not have any parent corporations, and there are no publicly held companies that hold ten percent or more of their stock. All other Petitioners are either individuals or a partnership comprised of the S corporations.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners V.R. DeAngelis M.D., P.C., R.T. Domingo M.D., P.C., V.R. DeAngelis M.D., P.C., Tax Matters Partner, Vincent DeAngelis, Jeanette DeAngelis, Rodolfo Domingo, Bernadette Domingo, Keith Durante, Kathleen Durante, Anthony J. Capizzi, and Mary Ann Capizzi respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The *per curiam* summary affirmance of the United States Court of Appeals for the Second Circuit, App. 1a-2a, is reported at 574 F.3d 789 (2d Cir. 2009). The opinion of the Tax Court, App. 3a-66a, is reported at 94 T.C.M. (CCH) 526 (2007).

JURISDICTION

The judgment of the court of appeals was entered on July 21, 2009. The court of appeals denied rehearing on October 26, 2009. App. 67a-68a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutes and regulations are reproduced in the Appendix. The statutes involved are 26 U.S.C. §§ 162(a), 419(b) through (e), 419A(f)(6), and 7491(a)(1). Relevant regulatory provisions are 26 C.F.R. §§ 1.162-1, 1.162-7, 1.162-9, 1.162-10(a), 1.162-10T, and 1.419A(f)(6)-1.

STATEMENT OF THE CASE

Introduction

The rulings below have profoundly shaken what has for decades stood as an unyielding principle of tax law, namely, that a taxpayer's subjective intent to minimize tax liability does not nullify otherwise lawful deductions. Compounding the harmful consequences of their holdings, the courts below ignored this principle in the context of one of the most important and commonly used deductions from income tax, which excludes from income "ordinary and necessary" business or trade expenses under 26 U.S.C. § 162(a).

The federal government collects trillions of dollars in income taxes from hundreds of millions of taxpayers.[1] For the complicated process of paying and collecting taxes on such a large scale to function properly, all involved actors—taxpayers, accountants, tax lawyers, the Internal Revenue Service ("IRS"), and courts that review IRS decisions—depend on a degree of certainty. Introducing too much ambiguity into the tax law can leave taxpayers unsure as to how much in taxes they should pay, can lead the IRS to implement vague or arbitrary standards, and could even leave the nation unable to clearly predict whether it will have sufficient revenue available to meet its needs. If left uncorrected, the holdings below will significantly erode a decades-old doctrine that has provided a crucial bedrock of certainty for millions of taxpayers and the IRS itself.

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1. For example, in 2007, the United States collected over $1.75 trillion in corporate and personal income taxes. See INTERNAL REVENUE SERVICE DATABOOK 2007, at 3, http://www.irs.gov/pub/irs-soi/07dbreturnfiled.pdf. That same year, the IRS received over 183 million income tax returns. *Id.* at 4.

Factual Background

This case stems from payments made by a group of professional corporations to provide life insurance to their employees.[2] The corporations are all S corporations, owned by the medical doctors and their spouses, which together formed a partnership to provide medical and surgical services. App. 7a. The corporations made the life insurance payments as part of a program known as the Severance Trust Executive Program Multiple Employer Supplemental Benefit Plan and Trust ("STEP"), which was organized pursuant to 26 U.S.C. § 419A(f)(6). App. 12a-13a.[3] STEP is a welfare benefit fund, which had more than 250 participating employers (including Petitioners), $50 million in assets, and averaged over $10 million a year in contributions during the relevant timeframe.[4]

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2. This case actually consolidates multiple separate cases, as is described by the Tax Court. See App. at 3a n.1.

3. Key terms of programs organized under Section 419A(f)(6) can be found at 26 U.S.C. § 419(b) through (e), included in the Appendix to this Petition. To qualify under Section 419A(f)(6), a plan must be: (1) a single welfare benefit plan; (2) to which ten or more employers contribute, and no single employer normally contributes more than ten percent of the total contributions; and (3) in which there are no "experience-rating" arrangements between the plan and the contributing employers.

4. Title 26 of the United States Code, at Section 419(e), contains the definition of a "welfare benefit fund." See also TREASURY PUBLICATION 535, BUSINESS EXPENSES (2009) ("TREASURY PUBLICATION 535"), at 7 (stating "[a] welfare benefit fund is a funded plan * * * that provides welfare benefits to your employees, independent contractors, or their beneficiaries," and "[w]elfare benefits are any benefits other than deferred compensation" or transfers of certain restricted property"), http://www.irs.gov/pub/irs-pdf/p535.pdf.

STEP was somewhat intricate in form, in order to comply with the rules under Section 419A(f)(6). The cash flow started with the doctors' corporations, which contributed the money to the partnership to pay for the benefits provided by STEP. The partnership then recorded and took in these payments as "forwarding fees," and counted them as additional income reportable by the partnership. STEP also included safeguards of an independent plan administrator and plan trustee. But the goal of STEP was simple: it purchased life insurance policies and used the policies' cash value to fund disability and severance benefits for the exclusive benefit of plan participants, the corporations' covered employees, and the participants' designated beneficiaries.

To that end, in 1993 and 1994, the S corporations made payments to the medical partnership to buy life insurance protection for the doctors. App. 26a-27a.[5] The initial payments, with compounded interest, formed a fund which paid the life insurance premiums for future years. In doing so, the partnership billed and received money from the doctors' corporations, which the partnership reported as taxable income. The partnership contractually agreed with the doctors to pay the money to STEP to provide benefits for them and their families in the event of illness or disability. And the partnership was contractually obligated to pay the money into STEP. As a result, the 1993 and 1994 payments were deducted from Petitioners'

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5. The partnership contributed $585,000 in both 1993 and 1994. STEP also provided life insurance payments for an office manager in the medical partnership, but the IRS has conceded that those payments are deductible, App. at 6a n.3, and so are not at issue in this Petition.

income, pursuant to the "ordinary and necessary" business deduction of 26 U.S.C. § 162(a). Later, in 2001 and 2002, when they qualified under the terms of STEP, two of the doctors received benefits from the plan (but the two remaining doctors did not qualify to receive any benefits from STEP). App. 49a-53a.

Procedural Background

On March 11, 2005, the IRS issued notices of deficiency to the individual Petitioners, and also issued a final partnership administrative adjustment to the medical partnership. On June 7, 2005, Petitioners challenged these decisions by filing petitions in the Tax Court, which had jurisdiction pursuant to 26 U.S.C. §§ 6213 and 6226.

Following a trial, the Tax Court refused to recognize Petitioners' payments to STEP as "ordinary and necessary" business deductions pursuant to 26 U.S.C. § 162(a). Without ruling on the question of whether STEP complied with Section 419A(f)(6), the Tax Court instead focused on Section 162(a). It acknowledged that "employers are not generally prohibited from funding term life insurance for their employees and deducting the premiums on that insurance as a business expense." App. 59a-60a. But rather than permit such expenses as deductions here, the Tax Court instead erroneously disallowed them, based on Petitioners' subjective intent.[6]

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6. The Tax Court proceedings were further seriously infected by the court's reliance on the testimony of the

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The Tax Court wrote that the doctors "used surplus cash of the [professional corporations] to purchase cash-laden whole life insurance policies primarily for the benefit of the participating doctors personally." App. 59a. According to the Tax Court, the doctors "fully expected to get their promised benefits," App. 61a, which were "both intended to be and actually returned to the insured doctor." App. 62a. The Tax Court faulted the doctors, and so disallowed the deduction, because "[f]rom the beginning of their decision to participate in the STEP plan, the participating doctors were most concerned about the amounts of, and their ability to receive, their expected benefits from STEP." App. 63a.

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government's expert witness and the virtual rejection of the testimony of the expert witness for Petitioners. The court concluded that Petitioners' expert had a conflict of interest due to his work for STEP's principals, and that the government's expert, whom the Tax Court judge had relied upon in a prior case, gave reliable and helpful testimony. In reality, the opposite was true. Petitioners' expert had no relationship with STEP prior to the litigation, whereas the government's expert had an irreconcilable conflict of interest. Not only had the government's expert been retained by STEP for 16 months during which he provided consulting and actuarial services and obtained access to STEP's confidential operating information, but at the time of trial he was the defendant in a $30 million lawsuit brought against him by STEP's administrators alleging breach of fiduciary duty and disclosure of confidential information. Thus, the Tax Court's findings regarding the experts were not proper. See, e.g., *Indmar Products Co., Inc.* v. *Comm'r*, 444 F.3d 771, 782 (6th Cir. 2006) (stating that, even with regard to determinations of credibility, "the Tax Court cannot ignore relevant evidence in making its factual findings and any inferences from those findings").

In short, because the doctors expected to "get their money as intended," according to the Tax Court, it prohibited the doctors' corporations from deducting payments to STEP for life insurance benefits. App. 63a.[7]

The court of appeals issued a summary, *per curiam* opinion affirming the order of the Tax Court for the reasons stated in that decision. App. 2a.[8] The court of appeals also summarily denied a petition for rehearing. App. 67a-68a. In doing so, the Second Circuit provided no substantive analysis, and simply disregarded Petitioners' arguments on rehearing that the taxpayer's subjective intent to minimize tax liability has no bearing on the legitimacy of a deduction.[9]

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7. The Tax Court also held that the payments the doctors made to STEP should not be included in the doctors' gross income. App. at 65a. That holding is not a subject of this Petition.

8. The court of appeals had appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 26 U.S.C. § 7482(a), given that Petitioners filed a notice of appeal in accordance with 26 U.S.C. § 7483 within 90 days of when the Tax Court entered its decision.

9. This is not the only significant legal argument that the Second Circuit declined to address. For example, the court of appeals did not discuss Petitioners' argument regarding 26 U.S.C. § 7491(a)(1). That provision states that, if a taxpayer introduces "credible evidence with respect to any factual issue relevant to ascertaining the liability," then the burden shifts so that the government "shall have the burden of proof with respect to such issue." *Id.* Here, given the extensive stipulations that the parties agreed to, as well as the significant credible evidence that Petitioners introduced during the trial, the burden accordingly should have shifted to the government, but the Tax Court refused to so rule. This is another significant

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REASONS FOR GRANTING THE PETITION

The Second Circuit has affirmed a Tax Court decision that directly contradicts longstanding and unquestioned precedent of this Court and the courts of appeals. In so ruling, the court of appeals has opened up a Pandora's Box of confusion. The decision will, for the first time in decades, permit the government to inquire into whether taxpayers intended to minimize their tax liability—an intent that until now has been deemed wholly irrelevant—and deny a deduction based on that intent. To prevent the profound uncertainty that this holding, if left to stand, would introduce to taxpayers throughout the country, review by this Court is essential.

I. THE SECOND CIRCUIT'S RULING DIRECTLY CONTRADICTS THE LONGSTANDING RULE, STATED BY THIS COURT AND BY THE COURTS OF APPEALS, THAT AN INTENT TO MINIMIZE TAXES DOES NOT NULLIFY OTHERWISE LAWFUL DEDUCTIONS.

For decades, a foundation of tax law has been that, so long as a taxpayer follows the law, it does not matter that the taxpayer seeks to minimize the amount of money he pays in taxes. As this Court stated decades ago, "[t]he legal right of a taxpayer to decrease the amount of what

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error made by the Second Circuit and the Tax Court that nonetheless could be corrected if this Court were to accept the Petition and, after holding in favor of Petitioners, remand the case for further proceedings.

otherwise would be his taxes * * * by means which the law permits, cannot be doubted." *Gregory* v. *Helvering*, 293 U.S. 465, 469 (1935) (citing *Superior Oil Co.* v. *Mississippi*, 280 U.S. 390, 395-396 (1930)). Therefore, "the question for determination is whether what was done, apart from the tax motive, was the thing which the statute intended." *Id.* See also *Knetsch* v. *United States*, 364 U.S. 361, 365 (1960) (Court examines "'what was done' here") (quoting *Gregory*). In other words, courts do not look at a taxpayer's subjective intent, but rather only at "the objective economic realities of a transaction." *Frank Lyon Co.* v. *United States*, 435 U.S. 561, 573 (1978).

The Second Circuit, before its affirmance of the Tax Court in this case, had been equally clear on this point. Judge Learned Hand wrote that "[a]ny one may so arrange his affairs that his taxes shall be as low as possible." *Helvering* v. *Gregory*, 69 F.2d 809, 810 (2d Cir. 1934). Thus, "a transaction, otherwise within an exception of the tax law, does not lose its immunity, because it is actuated by a desire to avoid, or, if one choose, to evade, taxation." *Id.* The Second Circuit in other cases has reinforced that these conclusions are correct. See, e.g., *United States* v. *Bok*, 156 F.3d 157, 162 (2d Cir. 1998) (stating "the taxpayer's intent is not determinative in defining the taxpayer's conduct"); *Kraft Foods* v. *Comm'r*, 232 F.2d 118, 128 (2d Cir. 1956) (stating that the pertinent inquiry "is not what the purpose of the taxpayer is, but whether what is claimed to be, is in fact").

The courts have good reason to consider only the objective question of whether a given transaction fits

within the law, and not the taxpayer's reasons for choosing the transaction. According to this Court, "[t]o make the taxability of the transaction depend upon the determination whether there existed an alternative form which the statute did not tax would create *burden and uncertainty*." *Founders General Corp.* v. *Hoey*, 300 U.S. 268, 275 (1937) (emphasis added).

But here, the court of appeals and the Tax Court engaged in precisely the sort of inquiry that these binding precedents have established as being out of bounds. The Tax Court, and through its summary affirmance, the Second Circuit, criticized Petitioners because they purportedly "fully expected to get their promised benefits," App. 61a, which were allegedly "both intended to be and actually returned to the insured doctor." App. 62a. The initial opinion similarly criticized Petitioners because, according to the Tax Court, "[f]rom the beginning of their decision to participate in the STEP plan, the participating doctors were most concerned about the amounts of, and their ability to receive, their expected benefits from STEP." App. 63a. In short, the courts below disallowed deductions on the basis that the doctors supposedly expected to "get their money as intended." App. 63a.[10]

Such reasoning is prohibited by *Gregory*, which holds that "the question for determination is whether what was done, apart from the tax motive, was the thing

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10. By contrast, a taxpayer's subjective intent can be relevant to the extent that a *bona fide* business purpose can save a transaction otherwise lacking in economic substance. See, e.g., *United States* v. *Wexler*, 31 F.3d 117, 126 (3d Cir. 1994).

which the statute intended." 293 U.S. at 469. Indeed, the Second Circuit and the Tax Court here disallowed otherwise permissible deductions because of their view of "the tax motive" of Petitioners.

This breach of precedent can have profound consequences. As this Court recognized in *Hoey*, such an inquiry "would create *burden and uncertainty*." 300 U.S. at 275 (emphasis added). Taxpayers for decades have structured their affairs thinking that they could safely seek to reduce their tax burden through any legal means. But the Second Circuit and the Tax Court have done away with that formerly secure assumption. Quite literally, the mere thought of taking a deduction to reduce taxes would nullify that tax deduction. Even if the courts below did not realize it, if left to stand, their opinions will create this severely destabilizing effect.

II. THERE SHOULD BE NO QUESTION THAT EMPLOYERS' PAYMENTS FOR EMPLOYEES' LIFE INSURANCE CONSTITUTE DEDUCTIBLE "ORDINARY AND NECESSARY" BUSINESS EXPENSES.

Further, the Second Circuit and the Tax Court impermissibly disallowed the corporations' expenditures for life insurance on the basis that such expenditures are not "ordinary and necessary" business expenses within the terms of 26 U.S.C. § 162(a). There should be no question that life insurance payments are indeed "ordinary and necessary," and therefore deductible. This Court has explained that an ordinary expense is one that is "normal, usual, or customary," *Deputy* v. *Du Pont*, 308 U.S. 488, 495 (1940), or one that is a "common and

accepted" expense for the taxpayer, by comparing the taxpayer to "the group, community, of which he is a part." *Welch* v. *Helvering*, 290 U.S. 111, 114 (1933). Expenses are "necessary" if they are "appropriate and helpful." *Id.* at 113. Contributions to a fund by a doctor's firm to purchase insurance or other benefits for the doctor and his family are "ordinary and necessary" in this context.

Even the Tax Court admitted this in principle, stating "employers are not generally prohibited from funding term life insurance for their employees and deducting the premiums on that insurance as a business expense." App. 59a-60a. Yet the Tax Court prohibited the deductions—from the corporations to the partnership, and from the partnership to STEP—under Section 162(a). It did so on the stated basis that it was not permissible for the corporations to buy "life insurance policies primarily for the benefit of the participating doctors personally." App. 59a.

This reasoning, which prohibits "life insurance policies primarily for the benefit of the participating doctors," has no basis in law. Rather, the governing statutes and regulations make clear that the purchase of life insurance policies for employees is a widely accepted "ordinary and necessary" business expense. Indeed, according to the IRS, "[a] corporation's nonrefundable contribution to an employees' trust to provide * * * life insurance * * * is deductible under section 162 of the Code." Rev. Rul. 69-478, 1969-2 C.B. 29.

The Third Circuit has come to the same conclusion, stating "[b]eyond peradventure, employee benefits like

life insurance are a form of compensation deductible by the employer." *Neonatology Assocs., P.A.* v. *Comm'r*, 299 F.3d 221, 228 (3d Cir. 2002). See also *Frahm* v. *Comm'r*, 94 T.C.M. (CCH) 504 (2007) (stating "Mr. Frahm's long-term care policy constitute[s] ordinary and necessary business expenses of Mr. Frahm's farming business within the meaning of section 162(a). See sec. 162(a)(1); sec. 1.162-10, Income Tax Regs."); *Schneider* v. *Comm'r*, 63 T.C.M. (CCH) 1787 (1992) (allowing physician to deduct almost $1,200,000 in contributions to his professional corporation's welfare benefit plan as ordinary and necessary business expenses); *Moser* v. *Comm'r*, 56 T.C.M. (CCH) 1605 (1989) (severance benefit similar to STEP constituted "dismissal wages" under § 162(a)), *aff'd*, 914 F.2d 1040 (8th Cir. 1990); *Scarbrough* v. *Comm'r*, 17 B.T.A. 317, 318, 321 (1929) (contributions to "sickness" welfare benefit plan are deductible as ordinary and necessary business expenses); *Hibbard, Spencer, Bartlett & Co.* v. *Comm'r*, 5 B.T.A. 464 (1926) (employer's payments to *bona fide* welfare benefit plan are deductible as ordinary and necessary business expenses).

The Second Circuit and the Tax Court did not rely on this long list of precedents. They also did not analyze the issue *ab initio*, pursuant to this Court's ample precedent regarding ordinary and necessary deductions. See, e.g., *Comm'r* v. *Lincoln Savings & Loan Ass'n*, 403 U.S. 345 (1971); *Du Pont*, 308 U.S. at 495; *Welch*, 290 U.S. at 111, 113, 114. And they did not closely examine the STEP life insurance payments pursuant to 26 C.F.R. § 1.162-10(a), which contains the criteria for determining when a deduction constitutes an ordinary and necessary expense.

Here, the payments—both from the corporations to the partnership, and from the partnership to STEP—went only towards contributions to a welfare benefit plan to purchase life insurance policies for their employees, and therefore should have been treated as deductible under Section 162(a). Indeed, the contributions were deductible as business expenses pursuant to five separate sections of the tax regulations: Section 1:162-1 (business expenses and insurance premiums); Section 1.162-7 (compensation for personal services); Section 1.162-9 (bonuses to employees); Section 1.162-10(a) (employee benefits) (stating "[a]mounts paid or accrued within the taxable year for dismissal wages, unemployment benefits, guaranteed annual wages, * * * welfare, or similar benefit plan, are deductible under section 162(a) if they are ordinary and necessary expenses of the trade or business"); and Section 1.162-10T (contributions to a welfare benefit fund). See also TREASURY PUBLICATION 535, at 17-18 ("You generally can deduct premiums you pay for the following kinds of insurance * * * * * 10. Life insurance covering your officers and employees * * * *").[11]

The courts below even declined to consider whether STEP complied with 26 U.S.C. § 419A(f)(6) and the rules and regulations that define it.

In short, the Second Circuit and the Tax Court ignored the substantial doctrine of law making clear that it is indeed permissible for employers to deduct

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11. Treasury Publication 535 also makes clear that it is appropriate to take "deductions for contributions to a welfare benefit fund" within the listed criteria. TREASURY PUBLICATION 535, at 7.

payments to provide life insurance coverage for their employees, and contributions to a welfare benefit plan, as ordinary and necessary business expenses. Instead, the courts below relied on an issue—the subjective intent of the taxpayer—that precedent prohibits. If this Court accepts this case for review and holds in favor of Petitioners, this would have the added benefit of allowing the Tax Court, on remand, to determine that the contested payments qualify as legitimate deductions under Section 162(a), and of permitting the Tax Court to determine in the first instance whether STEP satisfies the statutory requirements of Section 419A(f)(6) and of Section 419(e). Accordingly, certiorari should be granted.[12]

* * * * *

The Second Circuit, by giving its imprimatur to the flawed Tax Court decision, radically departs from a mainstay of tax law, which permits taxpayers to use any legal means to minimize their tax liability, no matter their intent. Even though Petitioners raised this issue in their petition for rehearing, the Second Circuit merely swept the issue under the rug. Yet the consequences could affect literally all Americans who have ever (until now) legally tried to minimize their tax liability, along with the accountants, lawyers, and judges who must make sense of the Tax Code on a daily basis. As such, the

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12. Further, on remand, the Tax Court would have the opportunity to resolve the Section 7491(a)(1) issue, and to hold a fair proceeding untainted by the testimony of the government's expert witness.

Second Circuit and the Tax Court have "decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. Rule 10(c).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 22, 2010

APPENDIX

APPENDIX A

574 F.3d 789, 104 A.F.T.R.2d 2009-5399, 2009-2 USTC P 50,508

United States Court of Appeals, Second Circuit.

V.R. DeANGELIS M.D., P.C., R.T. Domingo M.D., P.C., V.R. DeAngelis M.D., P.C., Tax Matters Partner, Vincent DeAngelis, Jeanette DeAngelis, Rodolfo Domingo, Bernadette Domingo, Keith Durante, Kathleen Durante, Anthony J. Capizzi, Mary Ann Capizzi, Petitioners-Appellants-Cross-Appellees,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee-Cross-Appellant.

Docket Nos. 08-1143-ag (L), 08-3357-ag (XAP), 08-3360-ag (XAP), 08-3361-ag (XAP), 08-3367-ag (XAP), 08-3376-ag (XAP).

Argued: May 29, 2009.

Decided: July 21, 2009.

Petitioners, who are doctors and their wives, the doctors' professional corporations, and a partnership comprised of the professional corporations appeal from orders of the Tax Court (Laro, J.) finding deficiencies in their payments of income taxes for tax years 1993 and 1994.

Affirmed.

Ira B. Stechel, Wormser, Kiely, Galef & Jacobs LLP, New York, N.Y. (John T. Morin and Jennifer L. Marlborough, on the brief) for Petitioners-Appellants-Cross-Appellees.

Randolph L. Hutter, Attorney, for John DiCicco, Acting Assistant Attorney General, Tax Division, Department of Justice, Washington, DC (Kenneth L. Greene, Attorney, on the brief) for Respondent-Appellee-Cross-Appellant.

Before: LEVAL, POOLER, and PARKER, Circuit Judges.

PER CURIAM:

We affirm the orders of the Tax Court for the reasons stated in its decision. *See V.R. DeAngelis M.D.P.C. v. Comm'r of Internal Revenue*, 94 T.C.M. (CCH) 526 (2007), a copy of which is annexed to this opinion as an appendix. We have considered petitioners' arguments for a contrary result and found them to lack merit.

C.A.2,2009.
DeAngelis v. C.I.R.
574 F.3d 789, 104 A.F.T.R.2d 2009-5399, 2009-2 USTC P 50,508

APPENDIX B

T.C. Memo. 2007-360, 2007 WL 4257483 (U.S.Tax Ct.), 94 T.C.M. (CCH) 526, T.C.M. (RIA) 2007-360, 2007 RIA TC Memo 2007-360

United States Tax Court.

V.R. DEANGELIS M.D.P.C. & R.T. Domingo M.D.P.C., V.R. Deangelis M.D.P.C., Tax Matters Partner, et al.,[1] Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Nos. 10634-05, 10637-05, 10635-05, 10638-05, 10636-06.

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[1] Cases of the following petitioners are consolidated herewith: Vincent and Jeanette DeAngelis (collectively, DeAngelises), docket No. 10635-05; Rodolfo and Bernadette Domingo (collectively, Domingos), docket No. 10636-05; Keith and Kathleen Durante (collectively, Durantes), docket No. 10637-05, and Anthony J. and Mary Ann Capizzi (collectively, Capizzis), docket No. 10638-05. While the parties sometimes refer to the name "DeAngelis" as "De Angelis", we consistently refer to that name as "DeAngelis". We also note that the first word in the name of each relevant professional corporation is a complete word but that the parties sometimes refer to the word by its initial letter. With the exception of the caption and of the partnership, V.R. DeAngelis M.D.P.C. & R.T. Domingo M.D.P.C., whose name is actually spelled using only the initial letter of the first word of each professional corporation referenced therein, we refer to each professional corporation by using its full first word.

Dec. 5, 2007.

John T. Morin and Ira B. Stechel, for petitioners.

Peter James Gavagan, Peggy J. Gartenbaum, and Thomas A. Dombrowski, for respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

LARO, Judge.

*1 These cases are consolidated for purposes of trial, briefing, and opinion. Each couple consists of a medical doctor and his wife, and each doctor is the sole owner of an S corporation that was a partner in the partnership V.R. DeAngelis M.D.P.C. & R.T. Domingo M.D.P.C. (VRD/RTD). These cases concern amounts paid in 1993 and 1994 by the S corporations to VRD/RTD and its ensuing contributions of those amounts to the Severance Trust Executive Program Multiple Employer Supplemental Benefit Plan and Trust (STEP), a plan that was promoted to wealthy professionals as a welfare benefits fund that was part of a 10-or-more-employer plan described in section 419A(f)(6).[2] STEP used the contributions to purchase and pay the premiums on six whole life insurance policies, five of which were each

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[2] Unless otherwise indicated, section references are to the applicable versions of the Internal Revenue Code, Rule references are to the Tax Court Rules of Practice and Procedure, and dollar amounts are rounded to the dollar. We use the term "plan" for convenience and do not suggest that any part of the STEP plan is a bona fide plan for Federal income tax purposes.

written with respect to one or both spouses of each couple (with the exception of the Capizzis, who had no policy insuring either of their lives) and were each payable to the beneficiaries of the insured's choosing in the event of the insured's death. The sixth life insurance policy was written on the life of Kerry Quinn (Ms. Quinn), an employee of VRD/RTD who was its office manager.

For each subject year, respondent determined in the notice of final partnership administrative adjustment (FPAA) that VRD/RTD could not deduct the $585,000 it paid in that year to STEP as contributions to a welfare benefits fund. The FPAA stated in part that the payments were not ordinary and necessary business expenses under section 162(a).

Respondent determined in the notices of deficiency that the individual petitioners had the following deficiencies in their 1993 and 1994 Federal income taxes:

Individual Petitioners	*1993*	*1994*
DeAngelises	$246,768	$208,447
Domingos	185,422	184,932
Durantes	29,174	42,020
Capizzis	1,957	1,546

The deficiencies generally are based on two determinations. First, respondent determined that the payments that the S corporations made to VRD/RTD for contribution to the STEP plan were not deductible by the S corporations because they were not ordinary and necessary business

expenses under section 162(a). Respondent accordingly increased the net amount of passthrough income received by each doctor from his S corporation. Second, respondent determined that each doctor received income under section 61(a) in the amount of the life insurance premiums that were paid by his S corporation on his behalf.

We decide whether the S corporations and VRD/RTD were entitled to deduct the payments related to the STEP plan as ordinary and necessary business expenses under section 162(a). We hold they were not to the extent that the payments related to the life insurance written on a life of someone other than Ms. Quinn.[3] We also decide whether each doctor realized income in the amount of the life insurance premiums that were paid by his S corporation on his behalf. We hold he did not.

FINDINGS OF FACT

I. Preliminaries

*2 Some facts were stipulated. The stipulated facts and the exhibits submitted therewith are incorporated herein by this reference. We find the stipulated facts accordingly. VRD/RTD had a legal address in the State of New York when its petition was filed. The individual petitioners

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[3] We understand respondent to have conceded that the payments are deductible to the extent they relate to the insurance written on the life of Ms. Quinn.

resided in the State of New York when their petitions were filed.

II. Individual Petitioners

A. Overview

Petitioner doctors are Vincent DeAngelis (Dr. DeAngelis), Rodolfo Domingo (Dr. Domingo), Keith Durante (Dr. Durante), and Anthony J. Capizzi (Dr. Capizzi) (collectively, doctors). During 1993 and 1994, each doctor wholly owned an S corporation that employed the doctor to provide his medical and surgical services for VRD/RTD. Each S corporation was a professional corporation (PC), the sole employee of which was its owner. The names of the PCs of Drs. DeAngelis, Domingo, Durante, and Capizzi were Vincent R. DeAngelis M .D.P.C., Rodolfo T. Domingo M.D.P.C., Keith Durante M.D.P.C., and Anthony J. Capizzi M.D.P.C., respectively.

Each doctor and his wife filed a joint Form 1040, U.S. Individual Income Tax Return, for each of the years 1993 and 1994. Each couple's returns reported compensation received from the doctor's PC during those years.[4]

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[4] We use the term "compensation" to refer to wages, salaries, and the like. Unlike petitioners, we do not consider the term "compensation" to include the doctors' distributive shares of income from their PCs. *See* sec. 61(a)(1), (13) (distinguishing as separate items of gross income "Compensation for services, including fees, commissions, fringe benefits, and similar items" from "Distributive share of partnership gross income"); *cf. Campbell v. Commissioner*, 943 F.2d 815, 822 (8th Cir.1991), *affg. in part and revg. in*

B. Dr. DeAngelis

During 1993, 1994, and 1995, Dr. DeAngelis's PC reportedly paid Dr. DeAngelis compensation of $928,000, $581,000, and $60,000, respectively. The DeAngelises' corresponding Federal income tax returns included those amounts in gross income. Dr. DeAngelis's PC did not reportedly pay Dr. DeAngelis any compensation thereafter.

C. Dr. Domingo

During 1993, 1994, 1995, and 1996, Dr. Domingo's PC reportedly paid Dr. Domingo compensation of $753,000, $452,976, $485,843, and $62,000, respectively. The Domingos' corresponding Federal income tax returns included those amounts in gross income. Dr. Domingo's PC did not reportedly pay Dr. Domingo any compensation thereafter.

D. Dr. Durante

During 1993, 1994, 1995, and 1996, Dr. Durante's PC reportedly paid Dr. Durante compensation of $136,000, $240,000, $283,919, and $208,079, respectively. The Durantes' corresponding Federal income tax returns included those amounts in gross income. During 1998 through 2003, Dr. Durante's PC reportedly paid Dr. Durante compensation of $289,398, $340,527, $258,393, $250,604, $258,208 and

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part on other grounds T.C. Memo.1990-162. Nor (as discussed below) does the STEP plan define the term "compensation" to include such distributive shares.

$240,000, respectively. The Durantes' corresponding Federal income tax returns included those amounts in gross income. The record does not allow the Court to find the amount of compensation (if any) that Dr. Durante's PC reportedly paid Dr. Durante in 1997.

E. Dr. Capizzi

During 1993 and 1994, Dr. Capizzi's PC reportedly paid Dr. Capizzi compensation of $609,000 and $719,001, respectively. The Capizzis' corresponding Federal income tax returns included those amounts in gross income. During 1996 through 2003, Dr. Capizzi's PC reportedly paid Dr. Capizzi compensation of $336,240, $240,070, $272,043, $294,601, $293,331, $190,271, $194,130 and $148,423, respectively. The Capizzis' corresponding Federal income tax returns included those amounts in gross income. The record does not allow the Court to find the amount of compensation (if any) that Dr. Capizzi's PC reportedly paid Dr. Capizzi in 1995.

III. VRD/RTD

A. General Information

*3 VRD/RTD was formed as a partnership on July 1, 1982, under the laws of New York. VRD/RTD provided medical and surgical services to its patients through the doctors and operated under the name "South Shore Surgical Specialists". VRD/RTD reported its income and

expenses for Federal income tax purposes using the cash receipts and disbursements method. VRD/RTD filed 1993 and 1994 Forms 1065, U.S. Partnership Return of Income, for its taxable years ended December 31, 1993 and 1994, respectively.

B. Partners and Employees

During 1993 and 1994, the five partners of VRD/RTD were the four PCs of the doctors and a fifth PC owned by another doctor, Edgar Borrero (Dr. Borrero). The senior partner of VRD/RTD was Vincent R. DeAngelis M.D.P.C. The partners' percentages of profits, losses, and ownership of capital for 1993 were as follows:

Partner	*Beginning of Year*	*End of Year*
Vincent R. DeAngelis M.D.P.C.	35.09%	25%
Rodolfo T. Domingo M.D.P.C	25.81	23
Anthony J. Capizzi M.D.P.C.	20.58	24
Edgar Borrero M.D.P.C.	18.52	18
Keith Durante M.D.P.C. [FN1]	0	10

[FN1] Keith Durante M.D.P.C. became a partner of VRD/RTD on or about July 1, 1993.

The partners' percentages of profits, losses, and ownership of capital for 1994 were as follows:

Partner	*Beginning of Year*	*End of Year*
Vincent R. DeAngelis M.D.P.C	25%	34%
Rodolfo T. Domingo M.D.P.C.	23	17

Anthony J. Capizzi M.D.P.C.	24	20
Edgar Borrero M.D.P.C.	18	17
Keith Durante M.D.P.C.	10	12

During 1993 and 1994, VRD/RTD employed nurses, office staff, and an office manager (i.e., Ms. Quinn). VRD/RTD had at least 29 employees during 1993 and at least 34 employees during 1994. VRD/RTD did not directly pay the doctors any compensation during either subject year.

C. Arrangements With PCs

VRD/RTD entered into arrangements with the PCs for the provision of the doctors' medical services. The doctors performed their services for the patients of VRD/RTD, and VRD/RTD billed the patients for the fees due on these services. VRD/RTD received payment of the fees, deposited the payments into its bank account, and reported the payments as income on its Forms 1065. Dr. Domingo performed services for VRD/RTD through the end of 1999; afterwards, through 2003, Dr. Domingo continued to work for his PC performing services for other than VRD/RTD. Dr. DeAngelis terminated his services with VRD/RTD on or about December 31, 2003.

D. Partnership Agreement

The VRD/RTD partnership agreement in effect for the subject years (partnership agreement) was executed on June 19, 1990. The partnership agreement stated that Drs. DeAngelis and Domingo were employed by their PCs and that any future doctor who wished his PC to become a

partner of VRD/RTD had to be employed by his PC. The partnership agreement stated that it was anticipated that Dr. DeAngelis would fully retire from VRD/RTD on July 1, 1994, and that Dr. Domingo would not retire until 1 year after Dr. DeAngelis retired. If Dr. DeAngelis continued working for VRD/RTD until at least July 1, 1995, the partnership agreement allowed Dr. Domingo to retire at the same time as Dr. DeAngelis or at any time after July 1, 1996. The partnership agreement provided for payments to be made to a doctor's PC in case the doctor became disabled.

IV. STEP

A. Overview

*4 STEP purports to provide eligible employees with severance benefits, funded entirely by their participating employer through the purchase of whole life insurance policies, and, if elected, an employer-provided optional life insurance benefit payable upon the death of a covered employee or an alternate insured.[5] STEP invested the contributions made to the STEP plan in whole life insurance policies issued by eight insurance companies; namely, Metropolitan Life Insurance Co. (MetLife), Allmerica Financial Life Insurance and Annuity Co., National Life Insurance Co. of Vermont, Prudential Life Insurance Co. of America, Equitable Life Assurance Society of the United States, ITT Hartford Life Insurance Co., New York Life Insurance and Annuity Corp., and

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[5] An employee's severance benefits were paid from the cash value of his or her whole life insurance policy.

Massachusetts Mutual Life Insurance Co. The life insurance policies insured the individuals covered by the STEP plan, and the STEP plan assets, as reported, consisted largely of the cash values of those policies. Insurance agents earned substantial commissions on the sales of the life insurance policies; e.g., $605,053 in 1994.

Drs. DeAngelis, Domingo, and Durante (collectively, participating doctors) participated in the STEP plan through their PCs and VRD/RTD. Alvin Rapp (Mr. Rapp) was an authorized insurance agent of MetLife, and he recommended that all contributions to the STEP plan made on behalf of the participating doctors be invested in whole life insurance policies issued by MetLife. That recommendation was followed. Each whole life insurance policy related to a participating doctor required that a payment be made annually on December 28 for the policy year beginning on that date.

B. Formation of the STEP Plan

The originator of the STEP concept was Kenneth L. Katz (Mr. Katz), an insurance agent credentialed as a chartered life underwriter and a chartered financial consultant. In 1988, Mr. Katz asked his friend, Jeffrey Mamorsky (Mr. Mamorsky), to draft a plan that could be marketed as a tax-beneficial welfare benefits fund that complied with section 419A(f)(6). Mr. Mamorsky was an attorney practicing primarily in the area of employee benefits and compensation. Mr. Mamorsky later also served as counsel to the STEP plan; in that capacity, Mr. Mamorsky was

available and willing to discuss with covered employees (at the expense of the STEP plan) the manner in which they should prepare their applications for benefits from the plan. The intent of the STEP plan was to create an incentive to buy, and thus to generate the sale of, whole life insurance policies through a claim of permissible tax avoidance and the ability to pay and deduct premiums on the purchased policies which would eventually be transferred to and owned by the insureds. Many participants in the STEP plan believed that the plan was one of deferred compensation.

Mr. Mamorsky prepared an initial version of the STEP plan on or about December 15, 1989, and Mr. Katz began operating the STEP plan at that time. Mr. Mamorsky prepared a second version of the STEP plan in 1990. Mr. Mamorsky wrote other and all versions of the STEP plan through June 2001, with an understanding that the deductibility of contributions was critical both to the marketability of the STEP plan and to the operation and existence of STEP. The various versions of the STEP plan through June 2001 included the following:

Version 1: Executed on December 15, 1989
Version 2: Version 1 Amended and Restated on July 26, 1990
Version 3: Executed on January 30, 1992
Version 4: Executed on December 29, 1993
Version 5: Executed as of November 1, 1994
Version 6: Executed as of February 14, 1997
Version 7: Executed as of June 11, 2001

*5 The four versions executed in or after 1993 were stated as effective as of January 1, 1993.[6]

C. Trustees, Administrators, and Sponsors

Connecticut National Bank was the STEP plan trustee from the plan's inception through April 1, 1992. The successor trustees were United States Trust Co. of New York (U.S.Trust), Mellon Trust of New York (Mellon Trust), and STEP Plan Services, Inc. (SPSI). U.S. Trust served as trustee from April 1,. 1992, through February 14, 1997; Mellon Trust served as trustee from February 14, 1997, through February 2002; and SPSI served as trustee from February 2002 to date.

STEP, Inc., served as the STEP plan administrator from the plan's inception through July 26, 1990. Teplitzky & Co., L.L.C. (Teplitzky & Co.), acting primarily through its principal Jeffrey Teplitzky (Mr. Teplitzky), was the successor plan administrator from July 26, 1990, through February 7, 2002. The current plan administrator is SPSI. During the relevant time, Daniel E. Carpenter (Mr. Carpenter) had sole signatory authority on behalf of SPSI and served as its chairman.

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[6] There is also a 1992 version of the STEP plan for MetLife and, beginning in February 1997, separate plans and trusts for the eight insurance companies whose policies were sold through STEP. According to petitioners, the participating doctors were covered by version 3 when VRD/RTD adopted the STEP plan on or about Dec. 20, 1993, and were covered by version 4 as of Dec. 29, 1993.

STEP, Inc., also served as the STEP plan sponsor from the plan's inception until April 1, 1992. U.S. Trust served as the successor plan sponsor from April 1, 1992, until February 14, 1997, when first STEP, Inc., and subsequently Teplitzky & Co. took over as successor plan sponsor. On February 7, 2002, Teplitzky & Co. resigned as plan sponsor and appointed SPSI as the successor plan sponsor.

During the subject years, Teplitzky & Co., acting as the STEP plan administrator, ran the daily operation of the STEP plan. U.S. Trust, as plan sponsor, interacted with the insurance companies whose policies were owned by the STEP plan and conducted the plan's marketing activities.

D. Marketing Documents

The STEP plan marketing documents set forth detailed examples of when severance benefits would and would not be paid under the plan.[7] These examples allowed individuals covered by the plan to time their departures from their businesses and to phrase their requests for severance benefits so that benefits would be paid to them under the STEP plan as they anticipated. The STEP plan marketing documents warned participants that "Benefits accrued for an employee are forfeited if the employee does not qualify for benefits under a bona fide severance as

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[7] Upon adopting the plan, each participating employer also was provided examples of qualifying severance events.

determined by STEP's Independent Fiduciary".[8] The STEP plan marketing documents advised participating employers that deductions for contributions to the STEP plan could be ultimately disallowed but that only taxes and interest, and no additional amounts such as penalties, would then be due because STEP had received an "opinion letter" from Mr. Mamorsky stating that it was "more likely than not" that the deductions would be allowed.

E. Independent Fiduciary

The STEP plan administrator had the sole authority to make determinations relating to "dismissal", "Total Disability", or "death", conditions that were prerequisites to the receipt of benefits from the STEP plan as written. In making those determinations, the plan administrator was required to rely on rules and regulations established by the STEP plan "Independent Fiduciary". Jules Pagano (Mr. Pagano) was the independent fiduciary of the STEP plan from its inception through February 2002; the STEP plan did not have any independent fiduciary thereafter. While serving as independent fiduciary, Mr. Pagano was authorized to and routinely did provide individuals seeking to obtain benefits under the plan with personal guidance on how to frame their requests so that they would receive their anticipated benefits under the plan as written. Upon receiving an actual claim for

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[8] In operation, however, forfeitures could occur only when projected plan assets equaled or exceeded projected plan liabilities on an employer by employer basis.

benefits, Mr. Pagano and the STEP plan administrator relied upon the documents submitted to them by the claimant and did not perform an independent investigation or verification of the claim. If a participant's claim for benefits as submitted did not qualify for benefits under the STEP plan, the STEP plan allowed the participant to reform his or her claim in order to receive his or her anticipated benefits.

F. Version 4 of the STEP Plan[9]

*6 Section 1.11, 1.13, and 1.14 of the STEP plan defines the terms "Covered Employee", "Eligible Employee", and "Employee". Section 2.1(c) states that "The Employer shall transmit to the Plan Administrator written notice of any substantial or unusual change in a Covered Employee's Compensation or status (e.g., from fulltime to parttime) as it occurs, but in any event no later than 30 days after the change occurs". Section 3.1 states that "A Covered Employee's Severance Benefit shall be determined in accordance with the Severance Benefit formula elected in the Adoption Agreement. In no event, however, may a Covered Employee's Severance Benefit exceed two times his Compensation paid during the twelve full-month period immediately preceding his Termination of Employment".

Section 3.3 states that an employer shall elect in the adoption agreement either a "fixed benefit" or a "flexible benefit". As to a fixed benefit, section

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[9] In our findings of fact set forth under this subheading, section references are to version 4 of the STEP plan.

3.3 states that the benefit payable to a covered employee shall equal the sum of the future service component for each year of participation plus the past service component. The future service component equals for each year of participation the amount of that year's "Compensation [defined as the "amount specified by the Employer in the Adoption Agreement"] multiplied by the Severance Benefit percentage elected by the Employer in the Adoption Agreement". The past service component equals the product of (1) the benefit percentage elected by the employer in the adoption agreement, (2) a fraction not to exceed 1, the numerator of which is the covered employee's past service and the denominator of which is 10, and (3) the covered employee's total compensation for the 10 years preceding the year of termination of employment.

As to a flexible benefit, section 3.3 allows a different percent of compensation to be elected for each year of service and states that the formula for computing a severance benefit is made applicable to the employer's contribution each year. In addition, there is a provision for adjustments each year based on benefits provided to other employees, forfeitures, investment earnings, and cost of insurance for the covered employee.

Section 4.1 states that the employer must annually contribute to the STEP plan such amounts as are calculated by the plan actuary to provide for severance benefits of its covered employees. The total amount to be contributed by all employers is "based upon reasonable actuarial

assumptions and methods taking into account the experience of the Plan, as an undivided and unweighted pool with no differentiation as to Covered Employees (other than those differentiations described below) or Participating Employers". The amount to be contributed by each employer is to be its allocable portion of the total for all employers.[10] Section 4.1 also states that the employer must contribute the cost of 1-year term life insurance for any life insurance benefit elected in the adoption agreement.

*7 Section 5.2(a) states that a participating employer must pay the STEP plan the annual cost of equivalent 1-year term insurance if the employer elects a life insurance benefit for its employees. Section 5.2(b) states that an employee may elect additional life insurance beyond the amount elected by the employer and that the employer must pay the STEP plan the annual cost of the equivalent 1-year term insurance and the employee must reimburse the employer for the additional cost. Section 5.2(c) states that the insurance benefit payable to the beneficiary of a covered employee is equal to the amount elected by the employer plus the amount elected by the employee. Section 5.2(f) states that the STEP plan may name the beneficiary, or the insured may name a beneficiary as long as the employer reimburses the STEP plan. Section 5.2(g) states that if the employer does not pay amounts due on the policy for the death benefit, STEP may declare

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[10] In operation, the STEP plan neither employed a plan actuary nor determined amounts to be contributed by the employers.

the policy lapsed or surrender the policy, or the beneficiary will be changed to STEP. Section 5.2(h) states that if the employer fails to make required payments, the insured may buy the policy from STEP for the policy value.

Section 10.4(a) states that an employer can withdraw from the STEP plan at any time and that the employees will have frozen benefits equal to the amounts they would have been eligible for on the dates of withdrawal. Section 10.5 states that if an employer fails to make a required contribution, it will be treated as if it withdrew on that date, and it will be treated the same as in the case of a withdrawal under section 10.4.

Section 11.1 and 11.3 allows the plan sponsor to "amend, modify or delete, in whole or in part, any provision of the Plan, provided the duties and responsibilities of the Trustee shall not be altered without its written consent" and states that "no amendment or reorganization may be made to this Plan which shall change or alter the fundamental purpose of the Plan expressed in the preface hereto". Section 11.2 allows the plan sponsor to reorganize the participating employers into other or separate plans.

V. VRD/RTD's Introduction to the STEP Plan

A. Introduction to the Plan

In late 1993, Drs. DeAngelis and Domingo were engaged in estate planning with their accountant, Richard Freeman (Mr. Freeman), and an estate planning attorney, Victor Finmann (Mr.

Finmann). Mr. Freeman advised Dr. DeAngelis to acquire additional life insurance coverage and suggested that he consider a severance pay plan for VRD/RTD. Mr. Freeman introduced Dr. DeAngelis to Mr. Rapp. Mr. Rapp discussed the STEP plan with Dr. DeAngelis and Mr. Freeman, characterizing the plan as a way to receive additional insurance coverage and to provide severance benefits, both with pretax dollars. Mr. Rapp recommended to Dr. DeAngelis that VRD/RTD form a section 419 welfare benefit trust because, he stated, it would secure immediate Federal income tax deductions, allow the owner-employees to accumulate significant wealth on a tax-deferred basis, secure assets with insurance company guaranties, and protect assets from creditors. Dr. DeAngelis discussed the STEP plan with the other doctors, their wives, Mr. Finmann, and others. Mr. Finmann advised Dr. DeAngelis that he was skeptical as to the validity of the STEP plan, as promoted.

B. Decision to Join Plan

*8 On December 20, 1993, Dr. DeAngelis decided on behalf of VRD/RTD to join the STEP plan and to provide coverage thereunder for the participating doctors and for Ms. Quinn. Dr. Borrero declined to participate in the STEP plan after hearing the presentation of the representatives of STEP. Dr. Capizzi initially expressed an intent to participate in the STEP plan but subsequently decided not to participate in the plan.

C. Illustrations

In or about late 1993, Mr. Rapp provided Drs. DeAngelis and Domingo with life insurance policy illustrations reflecting varying amounts of life insurance benefits and premium costs. Mr. Rapp informed Dr. Domingo that his projected severance benefit after 5 years would be $253,000 if he made two annual contributions of $225,000 and that the projected benefit would increase annually by approximately $238,000 for each additional $225,000 contribution that he made annually beginning in year 3. Mr. Rapp informed Dr. DeAngelis that his projected severance benefit after 3 years would be $312,000 if he made two annual contributions of $300,000 and that the projected benefit would increase by approximately $320,000 for each additional $300,000 contribution that he made annually beginning in year 3.

VI. VRD/RTD's Adoption of the STEP Plan

A. Execution of Adoption Agreement

On or about December 20, 1993, Dr. DeAngelis executed an adoption agreement for the STEP plan on behalf of VRD/RTD, making VRD/RTD a participating employer in the STEP plan effective as of January 1, 1993. VRD/RTD consented in the agreement to any future amendment of the STEP plan.

VRD/RTD elected in the adoption agreement to provide severance benefits to its eligible employees in the amount of 10 percent of an

employee's compensation for each year of participation, with no credit for past service. VRD/RTD also elected not to provide the optional life insurance benefit. Drs. DeAngelis and Domingo understood that in order for VRD/RTD to claim deductions for its contributions to STEP they had to couch any subsequent application for benefits in terms that appeared to make the severance event nonvolitional.

B. Relevant Provisions in the Adoption Agreement

Eligible employees were defined in the adoption agreement as all full-time employees, other than controlling owners, who were 21 and had completed 1 year of service and whose job title was "doctor" or "office administrator/business mgr". A "controlling owner" was defined in the adoption agreement as a person who owned more than a 25-percent voting interest in the participating employer, unless four or fewer other persons owned in the aggregate a greater voting interest than the person. The adoption agreement stated that the eligible employees were Drs. DeAngelis, Domingo, Durante, and Capizzi, and Ms. Quinn, and that Dr. Borrero was an employee who was excluded.[11] The adoption agreement defined the term "compensation" as "Total Compensation paid during the applicable period, including wages, bonuses and over time [sic], etc., but not including deferred compensation other than compensation deferred pursuant to Code

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[11] As noted above, Dr. Capizzi subsequently decided not to participate in the STEP plan. Ms. Quinn was the only employee of VRD/RTD who was covered by the STEP plan.

Section 401(k). Compensation shall also include salary reduction contributions excludable from gross income pursuant to Code Section 125."

C. Other Relevant Provisions

*9 According to the STEP plan, a covered employee was purportedly eligible to receive a severance benefit from the plan upon termination of employment (except for termination for cause) under the following circumstances: "dismissal; any termination of employment unless such termination constitutes a 'voluntary separation without good cause' within the meaning of New York State Unemployment Insurance Law; total disability; or death.[12] The STEP plan stated that benefits would normally start on the first day of the second month after approval of the claim for benefits, that the usual form of payment would be in equal monthly installments over 24 months from the date of the employee's termination, that the first installment would include any payments delayed because of processing, and that severance benefits could not exceed two times the employee's last 12 months of compensation before termination of employment. The STEP plan did not limit the amount of life insurance benefits that could be received by a covered employee and stated that the optional life insurance benefit (if elected) would be received in addition to the severance benefit if the covered employee died while employed by the participating employer. The

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[12] In operation, the STEP plan paid benefits to participants even though the covered employee did not fall within one of these circumstances.

STEP plan stated that a participating employer could choose to withdraw from the plan, that a participating employer could constructively withdraw from the plan by failing to make an annual contribution or by violating a plan provision, and that upon withdrawal, any optional life insurance benefit could be discontinued or purchased from the plan by the employee or alternate insured at a cost equal to the policy's value (defined as the amount that would be paid upon surrender of the coverage determined before the application of surrender charges). The STEP plan stated that the optional life insurance benefit also could be discontinued if the covered employee terminated service with the employer, the employer failed to make a contribution with respect to the coverage, or the covered employee ceased to be a covered employee. According to the STEP plan, any life insurance that was not purchased could be surrendered by the trustee or continued with the plan as beneficiary.

VII. VRD/RTD's Contributions to STEP

A. Forwarding Fees

The PCs of the participating doctors forwarded to VRD/RTD amounts required by STEP to pay the premiums due on the whole life insurance policies written on the lives of the participating doctors. The PCs and VRD/RTD referred to these transactions as "forwarding fees". During the subject years, VRD/RTD received the following amounts of forwarding fees from the PCs:

PC	*1993*	*1994*
Vincent R. DeAngelis M.D.P.C.	$300,000	$300,000
Rodolfo T. Domingo M.D.P.C.	225,000	225,000
Keith Durante M.D.P.C.	50,000	50,000
Total	575,000	575,000

The PCs deducted these forwarding fees as expenses in the year of payment.

*10 VRD/RTD recorded its receipt of the forwarding fees from the PCs as "Fee Income-DeAngelis PC", "Fee Income-Domingo PC", and "Fee Income-Durante PC", respectively. VRD/RTD recorded that these amounts were received from the PCs as pension contributions with respect to the participating doctors. VRD/RTD also received a total of $10,000 in each of the years 1993 and 1994, from the five PCs that were partners in VRD/RTD. The $10,000 was forwarded in each year to the STEP plan to pay the premium due on the policy insuring the life of Ms. Quinn. Of the $10,000, Dr. Capizzi's PC paid $2,400 in 1993 and $2,000 in 1994. The record does not allow the Court to find the portion of the $10,000 in either year that was paid by any of the other PC partners.

During each of 1993 and 1994, VRD/RTD contributed $585,000 to the STEP plan and recorded each of these contributions as a "Pension Contribution". VRD/RTD's partnership return reported the forwarding fees received from the PCs as income and claimed a corresponding

deduction for "Retirement plans, etc." VRD/RTD did not make any further contribution to STEP, and neither STEP nor any petitioner directly paid any further premium on the subject life insurance policies after the premiums were paid on December 28, 1994, for the policy year beginning on that date.

B. Issuance of Policies

When VRD/RTD adopted the STEP plan, all of VRD/RTD's contribution to the plan was invested in whole life insurance policies issued by MetLife and sold by Mr. Rapp. The particular policies were selected by the participating doctors in consultation with Mr. Rapp. All of the policies were participating whole life insurance polices, with the additional feature that extra premiums could be paid to purchase paid-up additions rider insurance (PUAR). A PUAR feature, when elected, essentially prefunds the annual premiums for a policy and accumulates any extra proceeds in the policy until needed to pay premiums in a later year.

As of December 28, 1993, MetLife issued the following six life insurance policies with respect to VRD/RTD's initial contribution to the STEP plan:

Insured/ Policy#	*Type of Policy*	*Face Value*
Dr. DeAngelis/ 931250799PR	Whole life	$2,156,442
Both DeAngelises/ 931250800A	Survivor whole life	4,818,200

Dr. Domingo/ 931250797PR	Whole life	1,327,656
Both Domingos/ 931250798A	Survivor whole life	3,500,000
Dr. Durante/ 931250795PR	Whole life	1,804,135
Ms. Quinn/ 931250796PR	Whole life &	409,184

Four of these policies were individual whole life insurance policies separately insuring the lives of Ms. Quinn and each of the participating doctors. The other two policies were joint and survivor whole life insurance policies (survivor whole life policies) or, in other words, life insurance that was not payable to the beneficiary until the deaths of both insureds. One survivor whole life policy insured both DeAngelises (DeAngelises survivor whole life policy), and the other survivor whole life policy insured both Domingos (Domingos survivor whole life policy). Neither Jeanette DeAngelis nor Bernadette Domingo was an employee of VRD/RTD, and the survivor whole life insurance policies were purchased by Drs. DeAngelis and Domingo as part of their Federal estate tax plans. On December 28, 1993, Dr. DeAngelis was 60 years old, Jeanette DeAngelis was 61 years old, and each of the Domingos was 61 years old. Also on that date, Dr. Durante was 37 years old, and Ms. Quinn was 38 years old. Dr. DeAngelis canceled other life insurance that he personally owned so that insurance on the lives of him and his wife could be purchased through the STEP plan with pretax dollars.

*11 The initial owner of each of the six policies was U.S. Trust, as trustee of the STEP plan. When U.S. Trust was replaced as trustee, the successor trustee was listed as owner. As further discussed below, in 2001 STEP transferred to the Domingos ownership of the two policies written on the lives of one or both of them; in 2002, STEP transferred to Dr. DeAngelis ownership of the policy written on his life; and in 2003, STEP transferred ownership of each of the remaining policies to the insured or insureds named on the policy.

The insured doctors designated the beneficiaries for their policies, and Ms. Quinn designated the beneficiaries for her policy; the STEP plan trustee was never listed as a beneficiary of any of the policies. The beneficiaries of the subject policies were:

Insured	*Beneficiary*
Dr. DeAngelis	DeAngelis Family Limited Partnership [FN1]
Both DeAngelises	DeAngelis Family Irrevocable Life Insurance Trust
Dr. Domingo	Domingo Family Irrevocable Life Insurance Trust
Both Domingos	Domingo Family Irrevocable Life Insurance Trust
Dr. Durante	Kathleen Durante
Ms. Quinn	Mother, 2 sisters, and 3 brothers

[FN1] The original beneficiary was Dr. DeAngelis's wife. On or about Sept. 6, 2002, MetLife changed the beneficiary to the

DeAngelis Family Limited Partnership pursuant to the request of Dr. DeAngelis.

Mr. Rapp recommended that the beneficiary of each of the survivor whole life policies be listed as an insurance trust in order to minimize the Federal estate tax consquences to the family of the insured, and Drs. DeAngelis and Domingo followed that recommendation. STEP wanted any life insurance benefit to be paid directly to the personal beneficiary of the insured, rather than to or through the STEP plan, because STEP did not want the STEP plan to be overfunded if and when it were to receive that benefit.

Two annual premiums were paid on each of the six policies, one for the policy year beginning December 28, 1993, and the other for the policy year beginning December 28, 1994. As to each policy, those premiums included the base premiums necessary to fund the whole life insurance component of the policy and premiums for PUAR. These payments were consistent with illustrated payments contained in correspondence from Mr. Rapp. The base premiums and PUAR premiums on the policies were as follows:

Insured/ Policy#	*Base Premium*	*PUAR/ Total*
Dr. DeAngelis/ 931250799PR	$81,596.64	$98,403.36/ $180,000
Both DeAngelises/ 931250800A	103,762.66	16,237.34/ 120,000
Dr. Domingo/ 931250797PR	53,093.13	52,656.87/ 105,750

Both Domingos/ 931250798A	77,845.00	42,155.00/ 120,000
Dr. Durante/ 931250795PR	21,996.32	28,003.68/ 50,000
Ms. Quinn/ 931250796PR	6,173.67	5,826.33/ 12,000
Total		587,750

Premiums were paid in the 2 years as follows:

Insured/ Policy#	*1993*	*1994*
Dr. DeAngelis/ 931250799PR	$180,000	$178,625
Both DeAngelises/ 931250800A	120,000	120,000
Dr. Domingo/ 931250797PR	105,750	104,375
Both Domingos/ 931250798A	120,000	120,000
Dr. Durante/ 931250795PR	50,000	50,000
Ms. Quinn/ 931250796PR	12,000	12,000
Total [FN1]	587,750	585,000

[FN1] We recognize that VRD/RTD deducted for 1993 contributions totaling $585,000. In that the premiums paid in 1993 totaled $587,750, we are unable to find in the record an explanation as to who paid the extra $2,750.

*12 The funds used to pay the premiums attributable to the two policies written on the lives of one or both of the DeAngelises came from Dr.

DeAngelis's PC, the funds used to pay the premiums attributable to the two policies written on the lives of one or both of the Domingos came from Dr. Domingo's PC, and the funds used to pay the premiums for the policy written on the life of Dr. Durante (Dr. Durante policy) came from his PC. The funds used to pay the premiums attributable to the policy written on the life of Ms. Quinn (Ms. Quinn policy) were taken on some apportioned basis from all five PCs that were partners in VRD/RTD.[13] In each of those cases, the funds used to pay the premiums went from each PC to VRD/RTD, from VRD/RTD to the STEP plan, and from the STEP plan to MetLife.

C. Additional Correspondence

On September 19, 1995, Mr. Katz provided Mr. Freeman with revised illustrations for the life insurance policies written with respect to Drs. DeAngelis and Domingo. Those illustrations had been requested by Drs. DeAngelis and Domingo to help them determine whether they wanted to make any additional contributions on their policies. The illustrations assumed that premiums were paid for only 3 years, 4 years, or 5 years. Mr. Katz informed Mr. Freeman that the projected severance benefits for Drs. DeAngelis and Domingo were approximately the cash values in their policies. Mr. Katz informed Mr. Freeman that he was formulating illustrations for the policies that would show a cash withdrawal of

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[13] As discussed above, the record does not allow the Court to find the specifics of that apportionment other than as to Dr. Capizzi's PC.

severance benefits and the premium required to continue the policies thereafter. On September 20, 1995, Mr. Rapp provided Drs. DeAngelis and Domingo with answers from MetLife and STEP to questions asked by those doctors.

On or about October 30, 1995, Mr. Katz provided Dr. DeAngelis with revised illustrations for his insurance policies showing only 2 years of out-of-pocket premium payments. Mr. Katz also provided Mr. Freeman with various other illustrations for the insurance policies written on the lives of Drs. DeAngelis and Domingo.

VIII. Payments of Premiums

A. Dr. DeAngelis Policy

The December 28, 1993 and 1994, premiums of $81,596.64 on the policy written on the single life of Dr. DeAngelis (Dr. DeAngelis policy) were paid timely,[14] and PUAR was purchased with additional premiums of $98,403.36 in 1993 and $97,028.36 in 1994. In 1996, the premium due on this policy as of December 28, 1995, was paid timely with a dividend withdrawal of $16,658.17 and a portion of a withdrawal of $123,004.98 from the PUAR.[15] As to the withdrawal from the

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[14] Although the premiums were not actually paid until after the due dates, we consider them to have been paid "timely". To this end, we understand each of the subject insurance policies to have allowed a grace period after the due date so that a premium paid during that period would be timely in the sense that the policy would not lapse.

[15] A dividend withdrawal relates to a dividend payable on a policy.

PUAR, $64,938.47 was used to pay the December 28, 1995, premium on this policy, and $58,066.51 was used to pay the December 28, 1995, premium on the DeAngelises survivor whole life policy. In 1997, the premium due on December 28, 1996, on the Dr. DeAngelis policy was paid timely with a dividend withdrawal of $15,247.77 and a withdrawal of $66,348.87 from the PUAR. The premium due on December 28, 1997, was not paid timely, and the policy lapsed for nonpayment of premiums. MetLife converted the policy to nonforfeiture extended term insurance with a face value of $2,192,891 through August 21, 2000, at which time it was set to be depleted of its cash value and thus to terminate without value.[16]

B. DeAngelises Survivor Whole Life Policy

*13 The December 28, 1993 and 1994, premiums of $103,762.66 on the DeAngelises survivor whole life policy were paid timely, and PUAR was purchased in each year with additional premiums of $16,237.34. In 1996, the premium due on December 28, 1995, was paid timely with a dividend withdrawal of $11,563.68, a withdrawal of $34,133.47 from the PUAR, and the above-referenced $58,066.51 withdrawal from the Dr. DeAngelis policy. In 1997, the premium due on December 28, 1996, was paid with a dividend

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[16] Extended term insurance is a life insurance policy nonforfeiture option that may be exercised when the policy lapses because of a failure to pay a premium owed on the policy. Under this option, the cash value of a lapsed policy is used to maintain the full original death benefit until the cash value is depleted.

withdrawal of $12,363 and a policy loan of $91,399.66. The premium due on December 28, 1997, was not paid timely, and the policy lapsed for nonpayment of the premium. MetLife converted the policy to participating reduced paid-up insurance with a face value of $588,731.[17]

On or about August 23, 1999, upon the request of Dr. DeAngelis (and in connection with a similar request of Dr. Domingo with respect to the Domingos survivor whole life policy), the DeAngelises survivor whole life policy was reinstated by MetLife to the full face value and converted retroactively to a policy with an automatic premium loan (APL) provision.[18] That feature was then applied to pay the premiums of $103,762.66 due on December 28, 1997 and 1998, through an APL of $207,525.32. MetLife's stated reason for reinstating the DeAngelises survivor whole life policy was that the policy had

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[17] A reduced paid-up feature is another life insurance policy nonforfeiture option that may be exercised when the policy lapses because of a failure to pay a premium owed on the policy. If such a feature is exercised, the remaining cash value of the policy is used to purchase a single premium life insurance policy with a lower death benefit. While the death benefit is reduced, the cash value in the policy is used up more slowly than under other nonforfeiture options.

[18] APL provisions allow an insurance company to pay a premium due on a policy by way of a loan taken out against the cash value of the policy. The loan is subject to interest charges and affects the policy's cash value only as a potential reduction of that value. The total amount of outstanding loans on the policy is usually less than the policy's cash value because the policy will generally lapse when the total amount of the loans exceeds that cash value.

lapsed because of "company error"; specifically, MetLife stated, Dr. DeAngelis wanted loans to be made automatically from the policy to pay the premiums and was not advised by the broker that the policy was set up with a nonforfeiture option of reduced paid-up insurance. The DeAngelises survivor whole life policy lapsed again after the nonpayment of the premium due on December 28, 1999 (the cash value in the policy was insufficient to support an APL), and in October 2000 was converted to participating reduced paid-up insurance with a face value of $669,547.

C. Dr. Domingo Policy

The December 28, 1993 and 1994, premiums of $53,093.13 on the policy written on the single life of Dr. Domingo (Dr. Domingo policy) were paid timely, and PUAR was purchased with additional premiums of $52,656.87 in 1993 and $51,281.87 in 1994. In 1996, the premium due on December 28, 1995, was paid timely with a dividend withdrawal of $10,358.01 and a withdrawal of $42,735.12 from the PUAR. In 1997, the premium due on December 28, 1996, was paid timely with a dividend withdrawal of $10,416.38 and a withdrawal of $42,676 .75 from the PUAR. The premium due on December 28, 1997, was not paid timely, and the policy lapsed for nonpayment of the premium. MetLife continued the policy as nonparticipating paid-up term insurance with a face value of $1,377,206 through December 1, 2000, at which time it was set to be depleted of its cash value and thus to terminate without value.

D. Domingos Survivor Whole Life Policy

The December 28, 1993 and 1994, premiums of $77,845 on the Domingos survivor whole life policy were paid timely, and PUAR was purchased in each year with additional premiums of $42,155. In 1996, the premium due on December 28, 1995, was paid timely with a dividend withdrawal of $8,960 and a withdrawal of $68,885 from the PUAR. In 1997, the premium due on December 28, 1996, was paid timely with a dividend withdrawal of $9,616, a withdrawal of $21,407 from the PUAR, and a policy loan of $46,820. The premium due on December 28, 1997, was not paid timely, and the policy lapsed for nonpayment of the premium. MetLife converted the policy to reduced paid-up insurance with a face value of $511,542.

*14 On or about October 19, 1999, upon the request of Dr. Domingo (and in connection with the above-referenced similar request of Dr. DeAngelis), the Domingos survivor whole life policy was reinstated by MetLife to the full face value and converted retroactively to a policy with an APL provision. That feature was then applied to pay the premiums of $77,845 due on December 28, 1997 and 1998, through an APL of $155,690. MetLife's stated reason for reinstating the Domingos survivor whole life policy in 1999 was that the policy had lapsed because of "company error"; specifically, MetLife stated, Dr. Domingo wanted loans to be made automatically from the policy to pay premiums and was not advised by the broker that the policy was set up with a nonforfeiture option of reduced paid-up

insurance. The Domingos survivor whole life policy lapsed again after the nonpayment of the premium due on December 28, 1999 (the cash value in the policy was insufficient to support an APL), and in 2000 was converted to participating reduced paid-up insurance with a face value of $579,263.

E. Dr. Durante Policy

The December 28, 1993 and 1994, premiums of $21,996.32 on the Dr. Durante policy were paid timely, and PUAR was purchased in each year with additional premiums of $28,003.68. In 1996, the premium due on December 28, 1995, was paid timely with a dividend withdrawal of $1,881.58 and a withdrawal of $20,114.74 from the PUAR. In 1997, the premium due on December 28, 1996, was paid timely with a dividend withdrawal of $1,618.17 and a withdrawal of $20,378.15 from the PUAR. The premium due on December 28, 1997, was not paid timely, and the policy lapsed for nonpayment of the premium. MetLife continued the policy as nonparticipating paid-up term insurance with a face value of $1,864,269 through February 1, 2005, at which time it was set to be depleted of its cash value and thus to terminate without value.

F. Ms. Quinn Policy

The December 28, 1993 and 1994, premiums of $6,173.67 on the Ms. Quinn policy were paid timely, and PUAR was purchased in each year with additional premiums of $5,826.33. In 1996, the premium due on December 28, 1995, was

paid timely with a dividend withdrawal of $422.06 and a withdrawal of $5,751.61 from the PUAR. In 1997, the premium due on December 28, 1996, was paid timely with a dividend withdrawal of $337.18 and a withdrawal of $5,836.49 from the PUAR. The premium due on December 28, 1997, was not paid timely, and the policy lapsed for nonpayment of the premium. MetLife continued the policy as nonparticipating paid-up term insurance with a face value of $410,881 through May 7, 2003, at which time it was set to be depleted of its cash value and thus to terminate without value.

IX. Dispute of Drs. DeAngelis and Domingo

In 1999, Dr. DeAngelis received a statement from STEP showing that the death benefit for the DeAngelises survivor whole life policy had decreased by approximately $3.5 million. The statement caused Dr. DeAngelis to write letters to STEP, Teplitzky & Co., and Mr. Rapp, requesting an explanation for the decrease in value. Dr. DeAngelis (and ultimately Dr. Domingo) also retained an attorney as to this matter.

*15 On investigation, Dr. DeAngelis concluded that the policies had lapsed for nonpayment of premiums, contrary to the advice that he had received at the inception of his participation in STEP that the policies would be self-sustaining after the making of the first two contributions. Because the option on each policy to pay the annual premiums through an APL had not been elected on the insurance application form, each of

the six subject policies lapsed as of the end of 1997.

The failure to make the APL election on the insurance application forms was partially that of Mr. Rapp, who misunderstood the expressed intent of Drs. DeAngelis and Domingo that the APL election be made on their policies. After the lapse of the policies, much correspondence on the subject ensued between Drs. DeAngelis and Domingo and their lawyer, on the one hand, and MetLife, Mr. Rapp, and/or Teplitzky & Co., among others, on the other hand, and Drs. DeAngelis and Domingo threatened to file a lawsuit as to the matter. Drs. DeAngelis and Domingo sought from MetLife the reinstatement of their and Ms. Quinn's single individual policies as reduced paid-up insurance retroactively to the original lapse date.

X. Reinstatement of Policies

A. Overview

On January 24, 2002, Marcia McDermott (Ms. McDermott), an internal consultant for MetLife, asked MetLife to reinstate the lapsed policies of Dr. DeAngelis and Ms. Quinn as paid-up insurance retroactively to the original lapse date, as if the policies had never lapsed. Previously, Ms. McDermott had made a similar request as to the Dr. Domingo policy. Because Dr. Durante did not ask Ms. McDermott to seek a similar reinstatement of the Dr. Durante policy, Ms. McDermott did not ask MetLife to reinstate the Dr. Durante policy.

B. Dr. Domingo Policy

STEP transferred ownership of the Dr. Domingo policy to Dr. Domingo in or about November 2001. Although the policy technically had no value, Dr. Domingo wanted the policy because Ms. McDermott had agreed to reinstate the policy as a reduced paid-up policy retroactive to December 28, 1997. Subsequently, pursuant to the request of Dr. Domingo, MetLife changed the Dr. Domingo policy to reduced paid-up insurance retroactively effective to December 28, 1997, with a face value of $195,924. MetLife stated in part that it was making this change because neither Dr. Domingo nor the STEP plan trustee had received timely notice of either the lapse of the policy or multidistrict litigation involving MetLife's marketing practices; the trustee had directed MetLife to send all mail to the trustee in care of the STEP plan administrator. Following this change, the Dr. Domingo policy has continued as participating reduced paid-up insurance.

From December 28, 1993, through the present, Dr. Domingo received life insurance coverage of $195,924 to $1,377,206 through the Dr. Domingo policy. As of December 28, 2005, the policy's death benefit and net cash surrender value were $267,034.57 and $185,025.58, respectively.

C. Dr. DeAngelis Policy

*16 On or about January 24, 2002, the ownership of the Dr. DeAngelis policy was changed to his name. Shortly thereafter, the Dr. DeAngelis policy was changed from nonforfeiture extended term

insurance to participating reduced paid-up insurance retroactively effective to December 28, 1997, with a face value of $264,809. MetLife stated in part that it was making this change because neither Dr. DeAngelis nor the STEP plan trustee had received timely notice of either the lapse of the policy or multidistrict litigation involving MetLife's marketing practices; the trustee had directed MetLife to send all mail to the trustee in care of the STEP plan administrator. Before the formal change of ownership, Dr. DeAngelis understood that the policy technically had no value but that MetLife was going to change the policy to reduced paid-up status retroactively to 1997. As of December 28, 2004 and 2005, respectively, the Dr. DeAngelis policy had a death benefit of $349,286 and $360,559.21 and a net cash surrender value of $232,215.81 and $244,798.07.

D. Ms. Quinn Policy

On January 3, 2003, Dr. DeAngelis formally terminated VRD/RTD's participation in STEP. At that time, Dr. DeAngelis offered on behalf of VRD/RTD to purchase from the STEP plan the DeAngelises survivor whole life policy, the Dr. Durante policy, and the Ms. Quinn policy. Dr. DeAngelis offered to purchase these policies at a cost of 10 percent of each policy's cash value, payable as a withdrawal from the policy's cash value.

On July 28, 2003, STEP assigned the ownership of the Ms. Quinn policy to Ms. Quinn. No severance event had occurred under the STEP

plan to permit this assignment. In connection with the assignment, Ms. Quinn executed a claim settlement and release form, backdated to January 3, 2003, the day of VRD/RTD's formal termination of its participation in the STEP plan.

On August 7, 2003, STEP informed Ms. Quinn that it had asked MetLife to change the ownership of the Ms. Quinn policy from the STEP trustee to Ms. Quinn and that any action to reinstate the policy had to be made by Ms. Quinn. One day later, MetLife informed SPSI that it had received STEP's request to change the ownership of the Ms. Quinn policy but MetLife's records indicated that the policy had expired and was no longer in force. At the request of Dr. DeAngelis, the Ms. Quinn policy was changed by MetLife later in 2003 to reduced paid-up insurance retroactively effective to December 28, 1997, with a face value of $34,135. On September 30, 2003, MetLife confirmed to Ms. Quinn that she was the owner of the Ms. Quinn policy and that the policy was being continued as reduced paid-up insurance in the amount of $34,135, which would increase as dividends were credited to the policy.

On or after January 16, 2004, Ms. Quinn surrendered the Ms. Quinn policy to MetLife and received a check from MetLife in the amount of $15,573.69. MetLife processed the check on January 27, 2004. From December 28, 1993, through January 16, 2005, Ms. Quinn received life insurance coverage of $34,135 to $410,881 through the Ms. Quinn policy.

XI. Survivor Whole Life Policies

A. Domingos Survivor Whole Life Policy

*17 On December 10, 2001, STEP assigned the ownership of the Domingos survivor whole life policy to Dr. Domingo. As of December 28, 2001, the Domingos survivor whole life policy had a total death benefit of $596,009.81, less an outstanding policy loan of $220,206.85, for a net death benefit of $375,802.96. As of the same date, the Domingos survivor whole life policy had a cash surrender value of $224,475.17, less the outstanding policy loan of $220,206.85, for a net cash surrender value of $4,268.32. As of November 2006, the Domingos survivor whole life policy had a cash value base of $277,316.37, a cash value of additional insurance of $21,380.58, an existing loan of $279,056.26, and loan interest due of $13,793.75, for a net cash surrender value of $5,846.94. From December 28, 1993, through the present, the Domingos received life insurance coverage of between $511,542 and $3,500,000 through the Domingos survivor whole life policy.

B. DeAngelises Survivor Whole Life Policy

On July 28, 2003, STEP assigned the ownership of the DeAngelises survivor whole life policy to the DeAngelises. No severance event had occurred under the STEP plan to permit this assignment. In connection with the assignment, Dr. DeAngelis also executed a claim settlement and release form backdated to January 3, 2003.

As of various times, the policy's death benefit and net cash surrender value were as follows:

As of	*Death Benefit*	*Net Cash Surrender Value*
3/1/1999	$595,195.38	$186,974.68
12/28/1999	4,663,784.34	220,495.10
12/28/2000	678,528.13	236,229.57
12/28/2001	688,464.08	253,038.08
2/5/2003	699,316.63	272,153.06
3/31/2003	669,547.00	274,537.72
12/28/2004	713,391.54	305,930.83
12/28/2005	719,830.71	324,053.39

XII. Dr. Durante Policy

As of March 1, 1999, the cash surrender value of the Dr. Durante policy was $52,982.52. As of December 31, 2001, the cash surrender value of the policy was $23,508.43. As of February 25, 2003, the cash surrender value of the Dr. Durante policy was $21,811.95. As of each of these dates, the death benefit payable under the policy was $1,864,269.

On July 28, 2003, STEP assigned the ownership of the Dr. Durante policy to Dr. Durante. No severance event had occurred under the STEP plan to permit this assignment. In connection with the assignment, Dr. Durante also executed a claim settlement and release form backdated to January 3, 2003.

On August 4, 2003, the cash surrender value of the Dr. Durante policy was $17,635.98, and the

death benefit was $1,864,269. The Dr. Durante policy had no value once it expired on February 1, 2005. From December 28, 1993, through February 1, 2005, Dr. Durante received life insurance coverage of $1,804,135 to $1,864,269 through the Dr. Durante policy.

XIII. Acquisition of STEP

STEP was acquired from Teplitzky & Co. in February 2002 by STEP Acquisition Group, Inc. Afterwards, SPSI offered participants three options. Option A was "To continue participation in the STEP Plan & Trust as the Plan is now and as it is amended from time to time." Option B was "To terminate our participation in the STEP Plan & Trust and to have 80% of the potential severance benefit paid out to each of our employees over a 24 month period." Option C was "To terminate our participation in the STEP Plan and rollover 90% of the potential severance benefit to purchase new insurance policies to provide death benefit protection in the BENISTAR 419 Plan and Trust." The STEP plan does not provide for any of these options. On June 28, 2002, Dr. DeAngelis signed a STEP "Option Selection Form" stating that VRD/RTD had decided "To continue participation in the STEP Plan & Trust as the Plan is now and as it is amended from time to time."

XIV. Recordkeeping for the STEP Plan

*18 STEP maintained its records of employer contributions; insurance policy premiums; potential severance benefits; policy values;

termination, surrender, or withdrawal dates; forfeitures; severance payments; "frozen" potential severance benefits; and surrenders and withdrawals on an employee-by-employee basis within each employer group, further segregated by each of the eight insurance companies participating in the STEP plan. STEP maintained its books and records first by insurance company, second by employer group, and finally by each individual employee. Forms 5500-C/R, Return/Report of Employee Benefit Plan, filed by the STEP plan were generally broken down by insurance company, employer group, and employee. Forms W-2, Wage and Tax Statement, were issued to participants with separate employer identification numbers for each life insurance company.

Each insurance policy was essentially a separate account for the covered employee on whose life the policy was written. The account included all of the employer's contributions for that employee, was increased by all of the income earned as a result of those contributions, was reduced by all insurance company charges to provide the life insurance benefits for only that employee, and was used as the base from which to calculate the purported severance benefits of that employee. A severance benefit that was paid out to an employee was typically not equal to what had been paid in by way of employer contributions. The employer contribution was invested by STEP, and the assets grew.

VRD/RTD's contributions were invested in the individual insurance policies of the participating

doctors and Ms. Quinn. The contributions for each policy were accounted for separately. Dividends were credited to the policy, and insurance charges were taken out of each of the policies to pay for the cost of providing the covered employee with life insurance coverage. STEP applied a factor to the cash value of the life insurance policy on the covered employee's life in order to compute the benefit payable to the employee. The insurance policies (or the cash derived therefrom) were distributed to VRD/RTD's participating employees without regard to STEP's purported computation of the allowable amounts of severance benefits.

XV. Dr. Domingo's Receipt of Plan Benefits

On April 3, 1997, Dr. Domingo wrote to Mr. Katz requesting a "legal opinionated [sic] letter" regarding his "intent to retire within the time period of 3 years" for "business reasons and for continuity of our surgical group." Dr. Domingo requested that any response be sent to him "Personal and Confidential." Mr. Katz relayed Dr. Domingo's letter to Mr. Pagano. On May 1, 1997, Mr. Pagano advised Dr. Domingo that he would receive full benefits under the STEP criteria of "good cause" and "genuine business purpose" if he resigned after being asked to retire. Mr. Pagano advised Dr. Domingo that he would not qualify for benefits if he agreed to work for VRD/RTD in a different capacity.

*19 On March 21, 2001, Dr. Domingo informed Teplitzky & Co. that on January 1, 1999, he "retired completely from my surgical practice" and

wanted to know about the severance monetary benefits available to him. On March 28, 2001, Teplitzky & Co. informed Dr. Domingo that he needed to establish a severance event in order to qualify for benefits under the plan and had to establish to the satisfaction of the plan's independent fiduciary that the termination was for good cause within the meaning of New York State Unemployment Insurance Law. Teplitzky & Co. enclosed examples of "good cause" under New York law and advised Dr. Domingo to call Mr. Mamorsky if he had any questions.

On June 17, 2001, Dr. Domingo relayed to the STEP plan administrator his revised request for severance benefits, including a formal "Request for Benefit Payments" and an attached "Reason for Termination of Service". The revised claim removed all reference to his prior statement that he had "completely retired" from his surgical practice. The revised claim stated that on October 5, 1998, VRD/RTD asked him to terminate his association with the group effective January 1, 1999, because his financial contribution to the group was not satisfactory. Dr. Domingo claimed that his compensation for the last 12-month period before his termination of service was $323,334.

On July 16, 2001, VRD/RTD mailed to Teplitzky & Co. an "Employer Request for Payment of Benefits" for Dr. Domingo listing the date of severance as January 1, 1999, and stating that the compensation paid to Dr. Domingo for the last 12-month period before termination of employment was $323,334. Attached to the

request was the same "Reason for Termination of Service" that Dr. Domingo had attached to his benefit request. Both forms were signed by Dr. DeAngelis on June 30, 2001. Before that request, neither VRD/RTD nor Dr. Domingo notified STEP that Dr. Domingo had stopped providing services to VRD/RTD on January 1, 1999.

On August 10, 2001, Teplitzky & Co. forwarded Dr. Domingo's claim for severance benefits to Mr. Pagano, asking Mr. Pagano if he agreed or disagreed with the claim. On September 4, 2001, Mr. Pagano informed Teplitzky & Co. that he had reviewed Dr. Domingo's claim for severance benefits and that he confirmed that it was an "induced termination due to non renewal of contract" which would be a qualifying event for severance benefits under the STEP plan.

On September 20, 2001, Teplitzky & Co. notified Dr. Domingo that his severance benefit had been approved in the estimated amount of $233,661 and offered Dr. Domingo the opportunity to "purchase" the Domingos survivor whole life policy, coverage of which was $587,232, for $5,496. On September 25, 2001, Dr. Domingo wrote to Teplitzky & Co. asking for answers to certain questions he had about his benefits and his life insurance policies, including a question as to why he had to pay so much to purchase the Domingos survivor whole life policy. On September 28, 2001, Teplitzky & Co. responded to Dr. Domingo's questions, indicating, among other things, that the purchase price for his policy was determined by subtracting from the $217,305 cash surrender value of the policy the

maximum loan that could be taken of $211,809, leaving a balance in the policy of $5,496. On October 9, 2001, Ms. McDermott confirmed in writing to Dr. Domingo that MetLife would be willing to change the policy on his life to reduced paid-up status retroactively effective to the date when a request to make such a change could have been timely made. Ms. McDermott also informed Dr. Domingo that the policy was still "technically an asset of the severance plan" so it would be a "good idea" to get the policy from the plan before the change was made. Ms. McDermott attached a letter showing that the policy is presently of "no value to the plan" to assist Dr. Domingo in getting the policy.

*20 On October 14, 2001, Dr. Domingo advised Teplitzky & Co. that he wished to purchase the Domingos survivor whole life policy. One day later, Dr. Domingo sent to Mellon Trust a $2,000 check from Rodolfo T. Domingo M.D.P.C. and a $3,496 check from the Domingo Family Limited Partnership as requested by the STEP plan administrator to purchase the Domingos survivor whole life policy. On October 24, 2001, Teplitzky & Co. applied for a policy loan on and requested a change in ownership of the Domingos survivor whole life policy. The policy loan was used to pay to Dr. Domingo his requested severance benefits totaling approximately $220,000.

XVI. Dr. DeAngelis's Receipt of Plan Benefits

Dr. DeAngelis filed a claim for severance benefits with STEP in November 2002. In connection therewith, Dr. DeAngelis on November 19, 2002,

signed a "Request for Payment of Benefits" stating that he was terminating his services because of "prostate cancer, with symptoms which interfere with employee's ability to perform surgery" and that his compensation for the 12-month period before his termination of service was approximately $350,000. Dr. DeAngelis underwent radiation and incurred radiation colitis to try to treat his prostate cancer and continued to work until December 31, 2003.

Wayne Bursey (Mr. Bursey), the president of SPSI, approved the claim. Mr. Bursey was concerned about the possibility of future litigation between Dr. DeAngelis and STEP, insofar as Drs. DeAngelis and Domingo had threatened suit against the prior plan administrator but had never instituted any such litigation.

OPINION

I. Overview

We are faced once again with an issue arising from a plan designed aggressively to bolster the sale of insurance products through a claim of permissible tax savings. *Cf. Neonatology Associates, P.A. v. Commissioner*, 115 T.C. 43, 99 (2000), *affd.* 299 F.3d 221 (3d Cir.2002). Respondent determined that neither the PCs' payments to VRD/RTD related to the STEP plan nor VRD/RTD's ensuing contributions to the STEP plan were deductible under section 162(a) as ordinary and necessary business expenses and that the amounts of the payments were includable in the doctors' gross income under

section 61(a). Respondent argues that the payments were made for the doctors' personal benefit. Petitioners argue that the payments and contributions are deductible under section 1.162-10(a), Income Tax Regs., as "Amounts paid or accrued within the taxable year for dismissal wages" and, thus, that the payments are not includable in the doctors' gross income. We agree with respondent's determination on the disallowed deductions but disagree with respondent's determination on the inclusion in income. We set forth our analysis below primarily in two sections. The first section sets forth our opinion of the credibility of the witnesses. The second section sets forth our opinion on the substantive issues at hand.

II. Credibility of the Witnesses

A. Expert Witnesses

*21 At trial, each party called an expert witness in support of their and his respective positions. Petitioners called Michael L. Frank (Mr. Frank), and the Court recognized him as an expert on experience rating and risk sharing. Mr. Frank is an actuary who graduated from the University of Michigan in 1987 and has worked in the insurance industry ever since. He currently works for his own company in part (1) advising employers on the purchase of insurance, (2) consulting on employee benefits and the plans related thereto, (3) brokering and underwriting insurance, and (4) helping insurance and other companies underwrite insurance. His credentials include that he is licensed to sell life and other

forms of insurance in 18 States, that he is an associate of the Society of Actuaries, that he is a member of the American Academy of Actuaries, and that he is a fellow of the Conference of Consulting Actuaries. Petitioners retained him less than 3 months before trial to testify as an expert in this proceeding. Mr. Carpenter, with whom Mr. Frank has had a longstanding working and personal relationship, recommended him.

Respondent called Charles C. DeWeese (Mr. DeWeese) at trial to testify as an expert, and the Court recognized Mr. DeWeese as an expert on multiple-employer benefit plans, insurance experience rating, and individual life insurance policies. Mr. DeWeese is an independent consulting actuary who graduated from Yale University in 1968 and has worked in the insurance industry ever since. His credentials include that he has been a fellow of the Society of Actuaries since 1972, a member of the American Academy of Actuaries since 1974, and a fellow of the Conference of Consulting Actuaries since 1987. Various courts, including this one, have previously recognized Mr. DeWeese as an expert on subjects similar to those relevant herein, and he has repeatedly testified as an expert on those subjects, including twice in this Court. *See Neonatology Associates, P.A. v. Commissioner*, *supra* at 85-86; *Booth v. Commissioner*, 108 T.C. 524, 573 (1997).

The Court has broad discretion to evaluate the cogency of an expert's analysis. *See Neonatology Associates, P.A. v. Commissioner*, *supra* at 85. Sometimes, an expert will help us decide a case.

See, e.g., id.; Booth v. Commissioner, supra at 573; *Trans City Life Ins. Co. v. Commissioner*, 106 T.C. 274, 302 (1996). Other times, he or she will not. *See, e. g., Estate of Scanlan v. Commissioner*, T.C. Memo.1996-331, *affd.* without published opinion 116 F.3d 1476 (5th Cir.1997); *Mandelbaum v. Commissioner*, T.C. Memo.1995-255, *affd. without published opinion* 91 F.3d 124 (3d Cir.1996). Aided by our common sense and our perception of the expert during his or her testimony, we weigh the helpfulness and persuasiveness of an expert's testimony in the light of his or her qualifications and with due regard to all other credible evidence in the record. *See Neonatology Associates, P.A. v. Commissioner, supra* at 84-85. We may embrace or reject an expert's opinion in toto, or we may pick and choose the portions of the opinion to adopt. *See Helvering v. Natl. Grocery Co.*, 304 U .S. 282, 294-295 (1938); *IT & S of Iowa, Inc. v. Commissioner*, 97 T.C. 496, 508 (1991). We are not bound by an expert's opinion and will reject an expert's opinion to the extent that it is contrary to the judgment we form on the basis of our understanding of the record as a whole. *See IT & S of Iowa, Inc. v. Commissioner, supra* at 508.

*22 In making our findings of fact and reaching our decisions herein, we have given little weight to the testimony of Mr. Frank. Although the Court recognized Mr. Frank as an expert on the stated subjects, we were and remain troubled that Mr. Frank has a longstanding and continuing working and personal relationship with Mr. Carpenter and other entities and persons with financial and/or other direct interests in the resolution of these

cases. *See Neonatology Associates, P.A. v. Commissioner*, 115 T.C. at 86 (stating that "An expert witness loses his or her impartiality when he or she is too closely connected with one of the parties" and holding that such an expert is of limited value to the Court). In fact, during trial, we were forced to admonish Mr. Frank that he should not be improperly communicating with one or more of the just-referenced persons and petitioners' counsel. In addition to that stated relationship, we also on the basis of our observation of Mr. Frank's candor, sincerity, and demeanor perceived him to be of little help to the Court in deciding these cases. As to Mr. DeWeese, we have respected his testimony and given that testimony appropriate weight. When Mr. DeWeese previously testified before this Court, the Court on each occasion found him to be reliable, relevant, and helpful on the areas that were the subject of his expertise. *See id.* at 85-86; *Booth v. Commissioner, supra* at 573. We find him likewise helpful in these cases.

B. Fact Witnesses

At trial, petitioners called five witnesses to testify as to the facts of these cases; respondent called three such witnesses. Petitioners' fact witnesses were Drs. DeAngelis and Domingo and Messrs. Mamorsky, Bursey, and Teplitzky. Respondent's fact witnesses were Dr. Borrero, Mr. Mamorsky, and Ms. McDermott.[19] On the basis of our

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[19] For completeness, we note that respondent also called Mr. Carpenter to testify at an evidentiary hearing held immediately before trial. Petitioners had moved the Court

perception of the witnesses and our review of the record as a whole, we do not find much of the testimony of the fact witnesses to be helpful as to the critical facts underlying the issues at hand. *See generally Neonatology Associates, P.A. v. Commissioner, supra* at 84 (discussing the standards that the Court applies to evaluate the testimony of trial witnesses). We rely mainly on the testimony of Mr. DeWeese and the voluminous record built by the parties through their comprehensive stipulation of facts and exhibits.

III. Substantive Issues at Hand

A. Disallowance of Deductions

Section 162(a) generally provides that "There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business". A taxpayer such as VRD/RTD or one of

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approximately 1 month before trial to issue an order generally disqualifying Mr. DeWeese from testifying as an expert witness in this proceeding and had attached to their motion an affidavit of Mr. Carpenter setting forth serious allegations questioning the objectivity of Mr. DeWeese. In respondent's response to that motion (as supplemented by petitioners to address in part a question by the Court as to why petitioners had not filed their motion earlier), respondent raised serious issues of truthfulness on the part of Mr. Carpenter and requested in part that the Court hold an evidentiary hearing so that respondent could question Mr. Carpenter as to his actions connected with this proceeding and the subject matter thereof. The Court granted respondent's request. The Court ultimately denied petitioners' motion as supplemented.

the PCs must meet five requirements in order to deduct an item under this section. The taxpayer must prove that the item claimed as a deductible business expense: (1) Was paid or incurred during the taxable year; (2) was for carrying on its trade or business; (3) was an expense; (4) was a necessary expense; and (5) was an ordinary expense.[20] *See Commissioner v. Lincoln Sav. & Loan Association*, 403 U.S. 345, 352 (1971); *Welch v. Helvering*, 290 U.S. 111, 115 (1933); *see also* Rule 142(a)(1). A determination of whether an expenditure satisfies each of these requirements is a question of fact. *See Commissioner v. Heininger*, 320 U.S. 467, 475 (1943).

*23 Petitioners argue that section 162(a) allowed VRD/RTD and the PCs to deduct the amounts related to the STEP plan because those amounts represented "dismissal wages" paid to a "welfare or similar benefit plan" within the scope of section 1.162-10(a), Income Tax Regs. We disagree. While the STEP plan may have been cleverly designed to appear to be a welfare benefits fund and marketed as such, the facts of these cases establish that the plan was nothing more than a subterfuge through which the participating doctors, through VRD/RTD, used surplus cash of the PCs to purchase cash-laden whole life insurance policies primarily for the benefit of the participating doctors personally. While employers

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[20] While sec. 7491(a) places the burden of proof upon the Commissioner in certain cases, the Court has decided in an unpublished order that sec. 7491(a) has no applicability to these cases.

are not generally prohibited from funding term life insurance for their employees and deducting the premiums on that insurance as a business expense under section 162(a), employees are not allowed to disguise their investments in life insurance as deductible benefit-plan expenses when those investments accumulate cash value for the employees personally. *See Neonatology Associates, P.A. v. Commissioner, supra* at 88-89.

The insurance premiums at hand pertained to the participating doctors' personal investments in whole life insurance policies that primarily accumulated cash value for those doctors personally. VRD/RTD's contributions to the STEP plan were used to pay the initial year's cost of providing life insurance for each participating doctor and to create an investment fund for the insured within his whole life insurance policy (or policies in the cases of Drs. DeAngelis and Domingo). That fund, when enhanced with expected future dividends, was calculated to be sufficient to pay for the future years' costs of life insurance protection and to provide for cash values sufficient to allow for a distribution of cash to the insured doctor whenever he opted to claim that he was involuntarily terminated from his business. As to each investment fund (and as to each insurance policy in general), the insured doctor regarded that fund (and policy) as his own, as did the STEP plan trustee, the STEP plan administrator, and MetLife. Very little (if any) value in one participating doctor's fund was available to pay to another insured, and any distribution of cash from the STEP plan to a participating doctor was directly related to the

cash value of his policy. In many instances, a participating doctor dealt with his own insurance agent in selecting and purchasing the policy on his life, received illustrations on an assortment of life insurance investments that could be made through the STEP plan, determined the amount of his investment in his life insurance policy, selected the form of the insurance policy to be issued for him (e.g., single whole life versus survivor whole life), and selected his policy's face amount. In the latter regard, we note our finding on the basis of the credible evidence in the record that Drs. DeAngelis and Domingo, when dealing with Mr. Rapp, MetLife, and the insurance policies in general, were not acting as agents of VRD/RTD but were acting in their individual capacities. We also note our finding that Dr. Durante was not acting as an agent of VRD/RTD with respect to his policy.

*24 The use of whole life insurance policies and the direct interactions between the participating doctors and the STEP plan representatives support our finding that the participating doctors in their individual capacities fully expected to get their promised benefits and that any receipt of those benefits was not considered by anyone connected with the life insurance transaction to rest on any unexpected or contingent event. Each whole life insurance policy upon its issuance was in and of itself a separate account of the insured doctor, and the insured (rather than the STEP plan) dictated and directed the funding and management of the account and bore most risks incidental to the account's performance. The STEP plan in essence and in operation was

simply an aggregation of separate plans for the participating doctors and not, as petitioners claim, one single plan in which various employers participated. The cash value in a participating doctor's policy was both intended to be and actually returned to the insured doctor, net of reductions for the cost of current insurance coverage and other de minimis amounts that were payable for charges related to the policies or otherwise incidental to the participation in the STEP plan. In fact, upon learning that their policies had lost the value that they expected to receive, Drs. DeAngelis and Domingo pursued recovery of those losses both directly and aggressively with their insurance agent and with the STEP plan representatives and caused the policies written on their lives to be transferred to them (and the Ms. Quinn policy to be transferred to her) as they had expected from the start of their investment in the STEP plan. As to the DeAngelises survivor whole life policy and the Domingos survivor whole life policy, the retroactive reinstatement and conversion of those policies to APL also rebuts petitioners' claim that each insurance policy was truly an asset of the STEP plan which the plan had the unfettered right to benefit from, to liquidate, or to dispose of; to the contrary, the cash value theoretically belonging to the STEP plan was converted into death benefits for Drs. DeAngelis and Domingo even though VRD/RTD had stopped making contributions years before the conversion.

We also note the events leading up to the initial purchase of the whole life insurance policies. Through the partnership agreement executed on

June 19, 1990, Drs. DeAngelis and Domingo had expressed their intent to retire in the near future. Yet, in connection with the planning of their personal estates and their consideration of ways to reduce the application to their estates of the Federal estate tax, Dr. DeAngelis caused VRD/RTD to join the STEP plan on December 30, 1993. Drs. DeAngelis and Domingo were told that their 1993 and 1994 payments to the STEP plan would suffice to fund the future costs of providing life insurance benefits for the remainder of their lives and to provide future distributions of cash to them at the time of their choosing. From the beginning of their decision to participate in the STEP plan, the participating doctors were most concerned about the amounts of, and their ability to receive, their expected benefits from STEP. In fact, Drs. DeAngelis and Domingo requested calculations and illustrations showing how much they would receive depending upon the number of years that contributions were made to the STEP plan. Drs. DeAngelis and Domingo also wrote to Mr. Katz for assurance that they would receive their benefits and requested a written opinion from the plan sponsor about how to characterize their planned departures from their practices so as to meet the terms of the STEP plan as written. STEP advised the participating doctors on what to say in order to get their promised benefits, and STEP assured the doctors that a protocol was in place to ensure that they would get their money as intended. Because each of the participating doctors' PCs funded its own employee's benefits under the STEP plan, STEP was at no significant

loss in allowing each PC to remove from the plan the money it invested therein.[21]

*25 Petitioners rely erroneously on *Booth v. Commissioner*, 108 T.C. 524 (1997), in arguing that these cases turn primarily not on the application of section 162(a) but on the question of whether the STEP plan meets the requirements of section 419A(f)(6). As discussed herein, our decisions in these cases turn on our factual evaluation of the relationship between the participating doctors and their whole life insurance policies without any regard to the STEP plan's qualification under section 419A(f)(6), and we decide on the basis of the credible evidence in the record before us that those doctors upon investing in the STEP plan had the primary right to receive the value reflected in the insurance policies written on their lives. We note in this regard that the Court in *Booth v. Commissioner*, *supra*, did not decide the issue under section 162(a) that we decide today.

In sum, we find that the PCs' payments to VRD/RTD were distributions to the doctors personally and that neither those payments nor VRD/RTD's ensuing contributions to STEP were ordinary and necessary business expenses under section 162(a) (except to the extent they relate to payments of premiums on the Ms. Quinn policy

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[21] We also are mindful that the provisions in the STEP plan were routinely not followed; e.g., Dr. Domingo received a "severance" benefit even though he informed the STEP plan administrator that he had "completely retired", a situation that even the author of the STEP plan admitted was not an eligible event under the STEP plan as written.

as discussed supra note 3). *Accord Neonatology Associates, P.A. v. Commissioner*, 115 T.C. 43 (2000). Consequently, we hold that those amounts are not deductible under section 162(a) by either the PCs or VRD/RTD.[22]

B. Inclusion in Income

Respondent determined that the amounts of the life insurance premiums that were paid by each doctor's PC on his behalf are includable in the doctor's gross income under section 61(a) as "accessions to wealth, clearly realized, and over which the taxpayers have complete dominion." *See Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955). We disagree that those amounts are includable in the doctors' gross income. While the payments of the premiums were indeed accessions to the doctors' wealth, our decision on this issue does not rest simply on that finding. Instead, our decision turns on our finding that the doctors' PCs were S corporations and that the payment of the premiums by the PCs was essentially a distribution to the doctors of corporate profits rather than a payment that the PCs made to the doctors with a compensatory intent. *See Neonatology Associates, P .A. v. Commissioner, supra* at 91-92, 95-96; *see also Neonatology Associates, P.A. v. Commissioner*, 299

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[22] Although the PCs may arguably be entitled to deduct the costs of the current life insurance protection purchased through the STEP plan, *see Neonatology Associates, P.A. v. Commissioner*, 115 T.C. 43 (2000), petitioners have not requested any such deductions, and the record does not allow the Court to find the amounts of any such deductions.

F.3d at 231-232. In accordance with the Federal income tax law applicable to S corporations, most particularly sections 1367 and 1368, our disallowance of the deductions claimed by the PCs has the effect of increasing pro tanto the net income of those PCs, with corresponding increases to the doctors' distributive shares of that income. That being so, the payments of the premiums are not taxed a second time to the doctors.[23] *Cf. Neonatology Associates, P.A. v. Commissioner*, 115 T.C. at 95-96 (tax at the shareholder-level was appropriate where the employer was a C corporation).

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*26 We have considered each argument made by petitioners for holdings contrary to those expressed herein and have rejected all arguments not discussed herein as irrelevant or without merit. We also have considered each argument made by respondent for a holding contrary to that expressed herein as to the inclusion in income and have rejected all arguments not discussed herein as irrelevant or without merit. Accordingly, Decisions will be entered under Rule 155.

U.S.Tax Ct.,2007.
V.R. Deangelis M.D.P.C. v. C.I.R.
T.C. Memo. 2007-360, 2007 WL 4257483 (U.S.Tax Ct.), 94 T.C.M. (CCH) 526, T.C.M. (RIA) 2007-360, 2007 RIA TC Memo 2007-360

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[23] In other words, we regard each distribution as a tax-free recovery of adjusted basis, taking into account the increase in basis resulting from the disallowance of deductions claimed by the PC.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 26th day of October, two thousand nine.

08-1143 -ag (Lead), 08-3357-ag (XAP), 08-3360-ag (XAP), 08-3361-ag (XAP), 08-3367-ag (XAP), 08-3376-ag (XAP)

V.R. DE ANGELIS M.D., P.C., R.T. DOMINGO M.D., P.C, V.R. DE ANGELIS M.D., P.C., TAX MATTERS PARTNER, VINCENT DE ANGELIS, JEANETTE DE ANGELIS, RODOLFO DOMINGO, BERNADETTE DOMINGO, KEITH DURANTE, KATHLEEN DURANTE, ANTHONY J. CAPIZZI, MARY ANN CAPIZZI,

Petitioners-Appellants-Cross-Appellees,

-v-

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee-Cross-Appellant.

Appellant Tax Matters Partner, Appellant-Cross-Appellee Anthony Capizzi, Appellant-Cross-Appellee V.R. De Angelis M.D., P.C., et al., having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel

that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

By: s/ Franklin Perez
Frank Perez, Deputy Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED
OCT 26 2009
Catherine O'Hagan Wolfe, Clerk

APPENDIX D

United States Code
Title 26. Internal Revenue Code
Subtitle A. Income Taxes
Chapter 1. Normal Taxes and Surtaxes
Subchapter B. Computation of Taxable Income
Part VI. Itemized Deductions for Individuals and Corporations

§ 162. Trade or business expenses

(a) In general.--There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including--

(1) a reasonable allowance for salaries or other compensation for personal services actually rendered;

(2) traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business; and

(3) rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

For purposes of the preceding sentence, the place of residence of a Member of Congress (including any Delegate and Resident Commissioner) within

the State, congressional district, or possession which he represents in Congress shall be considered his home, but amounts expended by such Members within each taxable year for living expenses shall not be deductible for income tax purposes in excess of $3,000. For purposes of paragraph (2), the taxpayer shall not be treated as being temporarily away from home during any period of employment if such period exceeds 1 year. The preceding sentence shall not apply to any Federal employee during any period for which such employee is certified by the Attorney General (or the designee thereof) as traveling on behalf of the United States in temporary duty status to investigate or prosecute, or provide support services for the investigation or prosecution of, a Federal crime.

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APPENDIX E

United States Code
Title 26. Internal Revenue Code
Subtitle A. Income Taxes
Chapter 1. Normal Taxes and Surtaxes
Subchapter D. Deferred Compensation, Etc.
Part I. Pension, Profit-Sharing, Stock Bonus Plans, Etc.
Subpart D. Treatment of Welfare Benefit Funds

§ 419. Treatment of funded welfare benefit plans

(a) General rule.--Contributions paid or accrued by an employer to a welfare benefit fund--

(1) shall not be deductible under this chapter, but

(2) if they would otherwise be deductible, shall (subject to the limitation of subsection (b)) be deductible under this section for the taxable year in which paid.

(b) Limitation.--The amount of the deduction allowable under subsection (a)(2) for any taxable year shall not exceed the welfare benefit fund's qualified cost for the taxable year.

(c) Qualified cost.--For purposes of this section--

(1) In general.--Except as otherwise provided in this subsection, the term "qualified cost" means, with respect to any taxable year, the sum of--

(A) the qualified direct cost for such taxable year, and

(B) subject to the limitation of section 419A(b), any addition to a qualified asset account for the taxable year.

(2) Reduction for funds after-tax income.--In the case of any welfare benefit fund, the qualified cost for any taxable year shall be reduced by such fund's after-tax income for such taxable year.

(3) Qualified direct cost.--

(A) In general.--The term "qualified direct cost" means, with respect to any taxable year, the aggregate amount (including administrative expenses) which would have been allowable as a deduction to the employer with respect to the benefits provided during the taxable year, if--

(i) such benefits were provided directly by the employer, and

(ii) the employer used the cash receipts and disbursements method of accounting.

(B) Time when benefits provided.--For purposes of subparagraph (A), a benefit shall be treated as provided when such benefit would be includible in the gross income of the employee if provided directly by the employer (or would be so includible but for any provision of this chapter excluding such benefit from gross income).

(C) 60-month amortization of child care facilities.--

(i) In general.--In determining qualified direct costs with respect to any child care facility for purposes of subparagraph (A), in lieu of depreciation the adjusted basis of such facility shall be allowable as a deduction ratably over a period of 60 months beginning with the month in which the facility is placed in service.

(ii) Child care facility.--The term "child care facility" means any tangible property which qualifies under regulations prescribed by the Secretary as a child care center primarily for children of employees of the employer; except that such term shall not include any property--

(I) not of a character subject to depreciation; or

(II) located outside the United States.

(4) After-tax income.--

(A) In general.--The term "after-tax income" means, with respect to any taxable year, the gross income of the welfare benefit fund reduced by the sum of--

(i) the deductions allowed by this chapter which are directly connected with the production of such gross income, and

(ii) the tax imposed by this chapter on the fund for the taxable year.

(B) Treatment of certain amounts.--In determining the gross income of any welfare benefit fund--

(i) contributions and other amounts received from employees shall be taken into account, but

(ii) contributions from the employer shall not be taken into account.

(5) Item only taken into account once.--No item may be taken into account more than once in determining the qualified cost of any welfare benefit fund.

(d) Carryover of excess contributions.--If--

(1) the amount of the contributions paid (or deemed paid under this subsection) by the employer during any taxable year to a welfare benefit fund, exceeds

(2) the limitation of subsection (b),

such excess shall be treated as an amount paid by the employer to such fund during the succeeding taxable year.

(e) Welfare benefit fund.--For purposes of this section--

(1) In general.--The term "welfare benefit fund" means any fund--

(A) which is part of a plan of an employer, and

(B) through which the employer provides welfare benefits to employees or their beneficiaries.

(2) Welfare benefit.--The term "welfare benefit" means any benefit other than a benefit with respect to which--

(A)section 83(h) applies,

(B)section 404 applies (determined without regard to section 404(b)(2)), or

(C)section 404A applies.

(3) Fund.--The term "fund" means--

(A) any organization described in paragraph (7), (9), (17), or (20) of section 501(c),

(B) any trust, corporation, or other organization not exempt from the tax imposed by this chapter, and

(C) to the extent provided in regulations, any account held for an employer by any person.

(4) Treatment of amounts held pursuant to certain insurance contracts.--

(A) In general.--Notwithstanding paragraph (3)(C), the term "fund" shall not include amounts held by an insurance company pursuant to an insurance contract if--

(i) such contract is a life insurance contract described in section 264(a)(1), or

(ii) such contract is a qualified nonguaranteed contract.

(B) Qualified nonguaranteed contract.--

(i) In general.--For purposes of this paragraph, the term "qualified nonguaranteed contract" means any insurance contract (including a reasonable premium stabilization reserve held thereunder) if--

(I) there is no guarantee of a renewal of such contract, and

(II) other than insurance protection, the only payments to which the employer or employees are entitled are experience rated refunds or policy dividends which are not guaranteed and which are determined by factors other than the amount of welfare benefits paid to (or on behalf of) the employees of the employer or their beneficiaries.

(ii) Limitation.--In the case of any qualified nonguaranteed contract, subparagraph (A) shall not apply unless the amount of any experience rated refund or policy dividend payable to an employer with respect to a policy year is treated by the employer as received or accrued in the taxable year in which the policy year ends.

(f) Method of contributions, etc., having the effect of a plan.--If--

(1) there is no plan, but

(2) there is a method or arrangement of employer contributions or benefits which has the effect of a plan,

this section shall apply as if there were a plan.

(g) Extension to plans for independent contractors.--If any fund would be a welfare benefit fund (as modified by subsection (f)) but for the fact that there is no employee-employer relationship--

(1) this section shall apply as if there were such a relationship, and

(2) any reference in this section to the employer shall be treated as a reference to the person for whom services are provided, and any reference in this section to an employee shall be treated as a reference to the person providing the services.

APPENDIX F

United States Code
Title 26. Internal Revenue Code
Subtitle A. Income Taxes
Chapter 1. Normal Taxes and Surtaxes
Subchapter D. Deferred Compensation, Etc.
Part I. Pension, Profit-Sharing, Stock Bonus Plans, Etc.
Subpart D. Treatment of Welfare Benefit Funds

§ 419A. Qualified asset account; limitation on additions to account

(a) General rule.--For purposes of this subpart and section 512, the term "qualified asset account" means any account consisting of assets set aside to provide for the payment of--

(1) disability benefits,

(2) medical benefits,

(3) SUB or severance pay benefits, or

(4) life insurance benefits.

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(f) Definitions and other special rules.--For purposes of this section--

(1) SUB or severance pay benefit.--The term "SUB or severance pay benefit" means--

(A) any supplemental unemployment compensation benefit (as defined in section 501(c)(17)(D)), and

(B) any severance pay benefit.

(2) Medical benefit.--The term "medical benefit" means a benefit which consists of the providing (directly or through insurance) of medical care (as defined in section 213(d)).

(3) Life insurance benefit.--The term "life insurance benefit" includes any other death benefit.

(4) Valuation.--For purposes of this section, the amount of the qualified asset account shall be the value of the assets in such account (as determined under regulations).

(5) Special rule for collective bargained and employee pay-all plans.--No account limits shall apply in the case of any qualified asset account under a separate welfare benefit fund--

(A) under a collective bargaining agreement, or

(B) an employee pay-all plan under section 501(c)(9) if--

(i) such plan has at least 50 employees (determined without regard to subsection (h)(1)), and

(ii) no employee is entitled to a refund with respect to amounts in the fund, other than a refund based on the experience of the entire fund.

(6) Exception for 10-or-more employer plans.--

(A) In general.--This subpart shall not apply in the case of any welfare benefit fund which is part of a 10-or-more employer plan. The preceding sentence shall not apply to any plan which maintains experience-rating arrangements with respect to individual employers.

(B) 10 or more employer plan.--For purposes of subparagraph (A), the term "10 or more employer plan" means a plan--

(i) to which more than 1 employer contributes, and

(ii) to which no employer normally contributes more than 10 percent of the total contributions contributed under the plan by all employers.

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APPENDIX G

United States Code
Title 26. Internal Revenue Code
Subtitle F. Procedure and Administration
Chapter 76. Judicial Proceedings
Subchapter E. Burden of Proof

§ 7491. Burden of proof

(a) Burden shifts where taxpayer produces credible evidence.--

(1) General rule.--If, in any court proceeding, a taxpayer introduces credible evidence with respect to any factual issue relevant to ascertaining the liability of the taxpayer for any tax imposed by subtitle A or B, the Secretary shall have the burden of proof with respect to such issue.

(2) Limitations.--Paragraph (1) shall apply with respect to an issue only if--

(A) the taxpayer has complied with the requirements under this title to substantiate any item;

(B) the taxpayer has maintained all records required under this title and has cooperated with reasonable requests by the Secretary for witnesses, information, documents, meetings, and interviews; and

(C) in the case of a partnership, corporation, or trust, the taxpayer is described in section 7430(c)(4)(A)(ii).

Subparagraph (C) shall not apply to any qualified revocable trust (as defined in section 645(b)(1)) with respect to liability for tax for any taxable year ending after the date of the decedent's death and before the applicable date (as defined in section 645(b)(2)).

(3) Coordination.--Paragraph (1) shall not apply to any issue if any other provision of this title provides for a specific burden of proof with respect to such issue.

(b) Use of statistical information on unrelated taxpayers.--In the case of an individual taxpayer, the Secretary shall have the burden of proof in any court proceeding with respect to any item of income which was reconstructed by the Secretary solely through the use of statistical information on unrelated taxpayers.

(c) Penalties.--Notwithstanding any other provision of this title, the Secretary shall have the burden of production in any court proceeding with respect to the liability of any individual for any penalty, addition to tax, or additional amount imposed by this title.

APPENDIX H

Code of Federal Regulations
Title 26. Internal Revenue
Chapter I. Internal Revenue Service, Department of the Treasury
Subchapter A. Income Tax
Part 1. Income Taxes
Normal Taxes and Surtaxes
Computation of Taxable Income
Itemized Deductions for Individuals and Corporations

§ 1.162-1 Business expenses.

(a) In general. Business expenses deductible from gross income include the ordinary and necessary expenditures directly connected with or pertaining to the taxpayer's trade or business, except items which are used as the basis for a deduction or a credit under provisions of law other than section 162. The cost of goods purchased for resale, with proper adjustment for opening and closing inventories, is deducted from gross sales in computing gross income. See paragraph (a) of § 1.161-3. Among the items included in business expenses are management expenses, commissions (but see section 263 and the regulations thereunder), labor, supplies, incidental repairs, operating expenses of automobiles used in the trade or business, traveling expenses while away from home solely in the pursuit of a trade or business (see § 1.162-2), advertising and other selling expenses, together with insurance premiums against fire, storm, theft, accident, or other similar losses in the case

of a business, and rental for the use of business property. No such item shall be included in business expenses, however, to the extent that it is used by the taxpayer in computing the cost of property included in its inventory or used in determining the gain or loss basis of its plant, equipment, or other property. See section 1054 and the regulations thereunder. A deduction for an expense paid or incurred after December 30, 1969, which would otherwise be allowable under section 162 shall not be denied on the grounds that allowance of such deduction would frustrate a sharply defined public policy. See section 162(c), (f), and (g) and the regulations thereunder. The full amount of the allowable deduction for ordinary and necessary expenses in carrying on a business is deductible, even though such expenses exceed the gross income derived during the taxable year from such business. In the case of any sports program to which section 114 (relating to sports programs conducted for the American National Red Cross) applies, expenses described in section 114(a)(2) shall be allowable as deductions under section 162(a) only to the extent that such expenses exceed the amount excluded from gross income under section 114(a).

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APPENDIX I

Code of Federal Regulations
Title 26. Internal Revenue
Chapter I. Internal Revenue Service, Department of the Treasury
Subchapter A. Income Tax
Part 1. Income Taxes
Normal Taxes and Surtaxes
Computation of Taxable Income
Itemized Deductions for Individuals and Corporations

§ 1.162-7 Compensation for personal services.

(a) There may be included among the ordinary and necessary expenses paid or incurred in carrying on any trade or business a reasonable allowance for salaries or other compensation for personal services actually rendered. The test of deductibility in the case of compensation payments is whether they are reasonable and are in fact payments purely for services.

(b) The test set forth in paragraph (a) of this section and its practical application may be further stated and illustrated as follows:

(1) Any amount paid in the form of compensation, but not in fact as the purchase price of services, is not deductible. An ostensible salary paid by a corporation may be a distribution of a dividend on stock. This is likely to occur in the case of a corporation having few shareholders, practically all of whom draw salaries. If in such a case the salaries are in excess of those ordinarily paid for

similar services and the excessive payments correspond or bear a close relationship to the stockholdings of the officers or employees, it would seem likely that the salaries are not paid wholly for services rendered, but that the excessive payments are a distribution of earnings upon the stock. An ostensible salary may be in part payment for property. This may occur, for example, where a partnership sells out to a corporation, the former partners agreeing to continue in the service of the corporation. In such a case it may be found that the salaries of the former partners are not merely for services, but in part constitute payment for the transfer of their business.

(2) The form or method of fixing compensation is not decisive as to deductibility. While any form of contingent compensation invites scrutiny as a possible distribution of earnings of the enterprise, it does not follow that payments on a contingent basis are to be treated fundamentally on any basis different from that applying to compensation at a flat rate. Generally speaking, if contingent compensation is paid pursuant to a free bargain between the employer and the individual made before the services are rendered, not influenced by any consideration on the part of the employer other than that of securing on fair and advantageous terms the services of the individual, it should be allowed as a deduction even though in the actual working out of the contract it may prove to be greater than the amount which would ordinarily be paid.

(3) In any event the allowance for the compensation paid may not exceed what is reasonable under all the circumstances. It is, in general, just to assume that reasonable and true compensation is only such amount as would ordinarily be paid for like services by like enterprises under like circumstances. The circumstances to be taken into consideration are those existing at the date when the contract for services was made, not those existing at the date when the contract is questioned.

(4) For disallowance of deduction in the case of certain transfers of stock pursuant to employees stock options, see section 421 and the regulations thereunder.

APPENDIX J

Code of Federal Regulations
Title 26. Internal Revenue
Chapter I. Internal Revenue Service, Department of the Treasury
Subchapter A. Income Tax
Part 1. Income Taxes
Normal Taxes and Surtaxes
Computation of Taxable Income
Itemized Deductions for Individuals and Corporations

§ 1.162-9 Bonuses to employees.

Bonuses to employees will constitute allowable deductions from gross income when such payments are made in good faith and as additional compensation for the services actually rendered by the employees, provided such payments, when added to the stipulated salaries, do not exceed a reasonable compensation for the services rendered. It is immaterial whether such bonuses are paid in cash or in kind or partly in cash and partly in kind. Donations made to employees and others, which do not have in them the element of compensation or which are in excess of reasonable compensation for services, are not deductible from gross income.

APPENDIX K

Code of Federal Regulations
Title 26. Internal Revenue
Chapter I. Internal Revenue Service, Department of the Treasury
Subchapter A. Income Tax
Part 1. Income Taxes
Normal Taxes and Surtaxes
Computation of Taxable Income
Itemized Deductions for Individuals and Corporations

§ 1.162-10 Certain employee benefits.

(a) In general. Amounts paid or accrued by a taxpayer on account of injuries received by employees and lump sum amounts paid or accrued as compensation for injuries, are proper deductions as ordinary and necessary expenses. Such deductions are limited to the amount not compensated for by insurance or otherwise. Amounts paid or accrued within the taxable year for dismissal wages, unemployment benefits, guaranteed annual wages, vacations, or a sickness, accident, hospitalization, medical expense, recreational, welfare, or similar benefit plan, are deductible under section 162(a) if they are ordinary and necessary expenses of the trade or business. However, except as provided in paragraph (b) of this section, such amounts shall not be deductible under section 162(a) if, under any circumstances, they may be used to provide benefits under a stock bonus, pension, annuity, profit-sharing, or other deferred compensation plan of the type referred to in section 404(a). In

such an event, the extent to which these amounts are deductible from gross income shall be governed by the provisions of section 404 and the regulations issued thereunder.

(b) Certain negotiated plans. (1) Subject to the limitations set forth in subparagraphs (2) and (3) of this paragraph, contributions paid by an employer under a plan under which such contributions are held in a welfare trust for the purpose of paying (either from principal or income or both) for the benefit of employees, their families, and dependents, at least medical or hospital care, and pensions on retirement or death of employees, are deductible when paid as business expenses under section 162(a).

(2) For the purpose of subparagraph (1) of this paragraph, the word "plan" means any plan established prior to January 1, 1954, as a result of an agreement between employee representatives and the Government of the United States, during a period of Government operation, under seizure powers, of a major part of the productive facilities of the industry in which the employer claiming the deduction is engaged. The phrase "plan established prior to January 1, 1954, as a result of an agreement" is intended primarily to cover a trust established under the terms of such an agreement. It also includes a trust established under a plan of an employer, or group of employers, who, by reason of producing the same commodity, are in competition with the employers whose facilities were seized and who would therefore be expected to establish such a trust as a reasonable measure to maintain a

sound position in the labor market producing the commodity. For example, if a trust was established under such an agreement in the bituminous coal industry, a similar trust established in the anthracite coal industry within a reasonable time, but before January 1, 1954, would qualify under subparagraph (1) of this paragraph.

(3) If any trust described in subparagraph (2) of this paragraph becomes qualified for exemption from tax under the provisions of section 501(a), the deductibility of contributions by an employer to such trust on or after any date of such qualification shall no longer be governed by the provisions of section 162, even though the trust may later lose its exemption from tax under section 501(a).

(c) Other plans providing deferred compensation. For rules relating to the deduction of amounts paid to or under a stock bonus, pension, annuity, or profit-sharing plan or amounts paid or accrued under any other plan deferring the receipt of compensation, see section 404 and the regulations thereunder.

APPENDIX L

Code of Federal Regulations
Title 26. Internal Revenue
Chapter I. Internal Revenue Service, Department of the Treasury
Subchapter A. Income Tax
Part 1. Income Taxes
Normal Taxes and Surtaxes
Computation of Taxable Income
Itemized Deductions for Individuals and Corporations

§ 1.162-10T Questions and answers relating to the deduction of employee benefits under the Tax Reform Act of 1984; certain limits on amounts deductible (temporary).

Q-1: How does the amendment of section 404(b) by the Tax Reform Act of 1984 affect the deduction of employee benefits under section 162 of the Internal Revenue Code?

A-1: As amended by the Tax Reform Act of 1984, section 404(b) clarifies that section 404(a) and (d) (in the case of employees and nonemployees, respectively) shall govern the deduction of contributions paid or compensation paid or incurred under a plan, or method or arrangement, deferring the receipt of compensation or providing for deferred benefits. Section 404(a) and (d) requires that such a contribution or compensation be paid or incurred for purposes of section 162 or 212 and satisfy the requirements for deductibility under either of these sections. However, notwithstanding the

above, section 404 does not apply to contributions paid or accrued with respect to a "welfare benefit fund" (as defined in section 419(e)) after July 18, 1984, in taxable years of employers (and payors) ending after that date.

Also, section 463 shall govern the deduction of vacation pay by a taxpayer that has elected the application of such section. Section 404(b), as amended, generally applies to contributions paid and compensation paid or incurred after July 18, 1984, in taxable years of employers (and payors) ending after that date. See Q&A-3 of § 1.404(b)-1T. For rules relating to the deduction of contributions attributable to the provision of deferred benefits, see section 404(a), (b) and (d) and § 1.404(a)-1T, § 1.404(b)-1T and § 1.404(d)-1T. For rules relating to the deduction of contributions paid or accrued with respect to a welfare benefit fund, see section 419, § 1.419-1T and § 1.419A-2T. For rules relating to the deduction of vacation pay for which an election is made under section 463, see § 301.9100-16T of this chapter and § 1.463-1T.

Q-2: How does the enactment of section 419 by the Tax Reform Act of 1984 affect the deduction of employee benefits under section 162?

A-2: As enacted by the Tax Reform Act of 1984, section 419 shall govern the deduction of contributions paid or accrued by an employer (or a person receiving services under section 419(g)) with respect to a "welfare benefit fund" (within the meaning of section 419(e)) after December 31, 1985, in taxable years of the employer (or person

receiving the services) ending after that date. Section 419(a) requires that such a contribution be paid or accrued for purposes of section 162 or 212 and satisfy the requirements for deductibility under either of those sections. Generally, subject to a binding contract exception (as described in section 511(e)(5) of the Tax Reform Act of 1984), section 419 shall also govern the deduction of the contribution of a facility (or other contribution used to acquire or improve a facility) to a welfare benefit fund after June 22, 1984. See Q&A-11 of § 1.419-1T. In the case of a welfare benefit fund maintained pursuant to a collective bargaining agreement, section 419 applies to the extent provided under the special effective date rule described in Q&A-2 of § 1.419-1T and the special rules of § 1.419A-2T. For rules relating to the deduction of contributions paid or accrued with respect to a welfare benefit fund, see section 419 and § 1.419-1T.

APPENDIX M

Code of Federal Regulations
Title 26. Internal Revenue
Chapter I. Internal Revenue Service, Department of the Treasury
Subchapter A. Income Tax
Part 1. Income Taxes
Normal Taxes and Surtaxes
Deferred Compensation, Etc.
Pension, Profit-Sharing, Stock Bonus Plans, Etc.

§ 1.419A(f)(6)-1 Exception for 10 or more employer plan.

(a) Requirements--(1) In general. Sections 419 and 419A do not apply in the case of a welfare benefit fund that is part of a 10 or more employer plan described in section 419A(f)(6). A plan is a 10 or more employer plan described in section 419A(f)(6) only if it is a single plan--

(i) To which more than one employer contributes;

(ii) To which no employer normally contributes more than 10 percent of the total contributions contributed under the plan by all employers;

(iii) That does not maintain an experience-rating arrangement with respect to any individual employer; and

(iv) That satisfies the requirements of paragraph (a)(2) of this section.

(2) Compliance information. A plan satisfies the requirements of this paragraph (a)(2) if the plan is maintained pursuant to a written document that requires the plan administrator to maintain records sufficient for the Commissioner or any participating employer to readily verify that the plan satisfies the requirements of section 419A(f)(6) and this section and that provides the Commissioner and each participating employer (or a person acting on the participating employer's behalf) with the right, upon written request to the plan administrator, to inspect and copy all such records. See § 1.414(g)-1 for the definition of plan administrator.

(3) Application of rules--(i) In general. The requirements described in paragraph (a)(1) and (2) of this section must be satisfied both in form and in operation.

(ii) Arrangement is considered in its entirety. The determination of whether a plan is a 10 or more employer plan described in section 419A(f)(6) is based on the totality of the arrangement and all related facts and circumstances, including any related insurance contracts. Accordingly, all agreements and understandings (including promotional materials and policy illustrations) and the terms of any insurance contract will be taken into account in determining whether the requirements are satisfied in form and in operation.

(b) Experience-rating arrangements--(1) General rule. A plan maintains an experience-rating arrangement with respect to an individual

employer and thus does not satisfy the requirement of paragraph (a)(1)(iii) of this section if, with respect to that employer, there is any period for which the relationship of contributions under the plan to the benefits or other amounts payable under the plan (the cost of coverage) is or can be expected to be based, in whole or in part, on the benefits experience or overall experience (or a proxy for either type of experience) of that employer or one or more employees of that employer. For purposes of this paragraph (b)(1), an employer's contributions include all contributions made by or on behalf of the employer or the employer's employees. See paragraph (d) of this section for the definitions of benefits experience, overall experience, and benefits or other amounts payable. The rules of this paragraph (b) apply under all circumstances, including employer withdrawals and plan terminations.

(2) Adjustment of contributions. An example of a plan that maintains an experience-rating arrangement with respect to an individual employer is a plan that entitles an employer to (or for which the employer can expect) a reduction in future contributions if that employer's overall experience is positive. Similarly, a plan maintains an experience-rating arrangement with respect to an individual employer where an employer can expect its future contributions to be increased if the employer's overall experience is negative. A plan also maintains an experience-rating arrangement with respect to an individual employer where an employer is entitled to receive (or can expect to receive) a rebate of all or a

portion of its contributions if that employer's overall experience is positive or, conversely, where an employer is liable to make additional contributions if its overall experience is negative.

(3) Adjustment of benefits. An example of a plan that maintains an experience-rating arrangement with respect to an individual employer is a plan under which benefits for an employer's employees are (or can be expected to be) increased if that employer's overall experience is positive or, conversely, under which benefits are (or can be expected to be) decreased if that employer's overall experience is negative. A plan also maintains an experience-rating arrangement with respect to an individual employer if benefits for an employer's employees are limited by reference, directly or indirectly, to the overall experience of the employer (rather than having all the plan assets available to provide the benefits).

(4) Special rules--(i) Treatment of insurance contracts--(A) In general. For purposes of this section, insurance contracts under the arrangement will be treated as assets of the fund. Accordingly, the value of the insurance contracts (including non-guaranteed elements) is included in the value of the fund, and amounts paid between the fund and the insurance company are disregarded, except to the extent they generate gains or losses as described in paragraph (b)(4)(i)(C) of this section.

(B) Payments to and from an insurance company. Payments from a participating employer or its employees to an insurance company pursuant to

insurance contracts under the arrangement will be treated as contributions made to the fund, and amounts paid under the arrangement from an insurance company will be treated as payments from the fund.

(C) Gains and losses from insurance contracts. As of any date, if the sum of the benefits paid by the insurer and the value of the insurance contract (including non-guaranteed elements) is greater than the cumulative premiums paid to the insurer, the excess is treated as a gain to the fund. As of any date, if the cumulative premiums paid to the insurer are greater than the sum of the benefits paid by the insurer and the value of the insurance contract (including non-guaranteed elements), the excess is treated as a loss to the fund.

(ii) Treatment of flexible contribution arrangements. Solely for purposes of determining the cost of coverage under a plan, if contributions for any period can vary with respect to a benefit package, the Commissioner may treat the employer as contributing the minimum amount that would maintain the coverage for that period.

(iii) Experience rating by group of employers or group of employees. A plan will not be treated as maintaining an experience-rating arrangement with respect to an individual employer merely because the cost of coverage under the plan with respect to the employer is based, in whole or in part, on the benefits experience or the overall experience (or a proxy for either type of experience) of a rating group, provided that no

employer normally contributes more than 10 percent of all contributions with respect to that rating group. For this purpose, a rating group means a group of participating employers that includes the employer or a group of employees covered under the plan that includes one or more employees of the employer.

(iv) Family members, etc. For purposes of this section, contributions with respect to an employee include contributions with respect to any other person (e.g., a family member) who may be covered by reason of the employee's coverage under the plan and amounts provided with respect to an employee include amounts provided with respect to such a person.

(v) Leased employees. In the case of an employer that is the recipient of services performed by a leased employee described in section 414(n)(2) who participates in the plan, the leased employee is treated as an employee of the recipient and contributions made by the leasing organization attributable to service performed with the recipient are treated as made by the recipient.

(c) Characteristics indicating a plan is not a 10 or more employer plan--(1) In general. The presence of any of the characteristics described in paragraphs (c)(2) through (c)(6) of this section generally indicates that the plan is not a 10 or more employer plan described in section 419A(f)(6). Accordingly, unless established to the satisfaction of the Commissioner that the plan satisfies the requirements of section 419A(f)(6) and this section, a plan having any of the

following characteristics is not a 10 or more employer plan described in section 419A(f)(6). A plan's lack of all the following characteristics does not create any inference that the plan is a 10 or more employer plan described in section 419A(f)(6).

(2) Allocation of plan assets. Assets of the plan or fund are allocated to a specific employer or employers through separate accounting of contributions and expenditures for individual employers, or otherwise.

(3) Differential pricing. The amount charged under the plan is not the same for all the participating employers, and those differences are not merely reflective of differences in current risk or rating factors that are commonly taken into account in manual rates used by insurers (such as current age, gender, geographic locale, number of covered dependents, and benefit terms) for the particular benefit or benefits being provided.

(4) No fixed welfare benefit package. The plan does not provide for fixed welfare benefits for a fixed coverage period for a fixed cost, within the meaning of paragraph (d)(5) of this section.

(5) Unreasonably high cost. The plan provides for fixed welfare benefits for a fixed coverage period for a fixed cost, but that cost is unreasonably high for the covered risk for the plan as a whole.

(6) Nonstandard benefit triggers. Benefits or other amounts payable can be paid, distributed, transferred, or otherwise provided from a fund

that is part of the plan by reason of any event other than the illness, personal injury, or death of an employee or family member, or the employee's involuntary separation from employment. Thus, for example, a plan exhibits this characteristic if the plan provides for the payment of benefits or the distribution of an insurance contract to an employer's employees on the occasion of the employer's withdrawal from the plan. A plan will not be treated as having the characteristic described in this paragraph merely because, upon cessation of participation in the plan, an employee is provided with the right to convert coverage under a group life insurance contract to coverage under an individual life insurance contract without demonstrating evidence of insurability, but only if there is no additional economic value associated with the conversion right.

(d) Definitions. For purposes of this section:

(1) Benefits or other amounts payable. The term benefits or other amounts payable includes all amounts that are payable or distributable (or that will be otherwise provided) directly or indirectly to employers, to employees or their beneficiaries, or to another fund as a result of a spinoff or transfer, and without regard to whether payable or distributable as welfare benefits, cash, dividends, rebates of contributions, property, promises to pay, or otherwise.

(2) Benefits experience. The benefits experience of an employer (or of an employee or a group of employers or employees) means the benefits and

other amounts incurred, paid, or distributed (or otherwise provided) directly or indirectly, including to another fund as a result of a spinoff or transfer, with respect to the employer (or employee or group of employers or employees), and without regard to whether provided as welfare benefits, cash, dividends, credits, rebates of contributions, property, promises to pay, or otherwise.

(3) Overall experience--(i) Employer's overall experience. The term overall experience means, with respect to an employer (or group of employers), the balance that would have accumulated in a welfare benefit fund if that employer (or those employers) were the only employer (or employers) providing welfare benefits under the plan. Thus, the overall experience is credited with the sum of the contributions under the plan with respect to that employer (or group of employers), less the benefits and other amounts paid or distributed (or otherwise provided) with respect to that employer (or group of employers) or the employees of that employer (or group of employers), and adjusted for gain or loss from insurance contracts (as described in paragraph (b)(4)(i) of this section), investment return, and expenses. Overall experience as of any date may be either a positive or a negative number.

(ii) Employee's overall experience. The term overall experience means, with respect to an employee (or group of employees, whether or not employed by the same employer), the balance that would have accumulated in a welfare benefit fund if the

employee (or group of employees) were the only employee (or employees) being provided welfare benefits under the plan. Thus, the overall experience is credited with the sum of the contributions under the plan with respect to that employee (or group of employees), less the benefits and other amounts paid or distributed (or otherwise provided) with respect to that employee (or group of employees), and adjusted for gain or loss from insurance contracts (as described in paragraph (b)(4)(i) of this section), investment return, and expenses. Overall experience as of any date may be either a positive or a negative number.

(4) Employer. The term employer means the employer whose employees are participating in the plan and those employers required to be aggregated with the employer under section 414(b), (c), or (m).

(5) Fixed welfare benefit package--(i) In general. A plan provides for fixed welfare benefits for a fixed coverage period for a fixed cost, if it--

(A) Defines one or more welfare benefits, each of which has a fixed amount that does not depend on the amount or type of assets held by the fund;

(B) Specifies fixed contributions to provide for those welfare benefits; and

(C) Specifies a coverage period during which the plan agrees to provide specified welfare benefits, subject to the payment of the specified contributions by the employer.

(ii) Treatment of actuarial gains or losses. A plan will not be treated as failing to provide for fixed welfare benefits for a fixed coverage period for a fixed cost merely because the plan does not pay the promised benefits (or requires all participating employers to make proportionate additional contributions based on the fund's shortfall) when there are insufficient assets under the plan to pay the promised benefits. Similarly, a plan will not be treated as failing to provide for fixed welfare benefits for a fixed coverage period for a fixed cost merely because the plan provides a period of extended coverage after the end of the coverage period with respect to employees of all participating employers at no cost to the employers (or provides a proportionate refund of contributions to all participating employers) because of the plan-wide favorable actuarial experience during the coverage period.

(e) Maintenance of records. The plan administrator of a plan that is intended to be a 10 or more employer plan described in section 419A(f)(6) shall maintain permanent records and other documentary evidence sufficient to substantiate that the plan satisfies the requirements of section 419A(f)(6) and this section. (See § 1.414(g)-1 for the definition of plan administrator.)

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Supreme Court, U.S.
APR 16 2010
OFFICE OF THE CLERK

No. 09-895

IN THE

Supreme Court of the United States

VR DeANGELIS M.D., P.C., R.T. DOMINGO M.D., P.C., VR DeANGELIS M.D., P.C., TAX MATTERS PARTNER, VINCENT DeANGELIS, JEANETTE DeANGELIS, RODOLFO DOMINGO, BERNADETTE DOMINGO, KEITH DURANTE, KATHLEEN DURANTE, ANTHONY J. CAPIZZI, MARY ANN CAPIZZI,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

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CORPORATE DISCLOSURE STATEMENT

The only corporate Petitioners are V R DeAngelis M D , P C and R T Domingo M.D , P C These two entities are S corporations that do not have any parent corporations, and there are no publicly held companies that hold ten percent or more of their stock All other Petitioners are either individuals or a partnership comprised of the S corporations

PETITION FOR REHEARING

Pursuant to Rule 44 2, the DeAngelis Petitioners respectfully petition for rehearing of the Court's March 22, 2010 order denying certiorari in this case Although this Court rarely grants petitions for rehearing, allowing this extremely flawed Tax Court decision to stand without any substantive review from the Court of Appeals or this Court will undoubtedly lead to confusion for federal courts across the country charged with interpreting whether a deduction is an "ordinary and necessary" business expense Without restating arguments advanced in the original petition, this petition for rehearing should be granted because allowing this flawed decision to stand will have dramatic and very negative repercussions for the future of tax law in the United States *See Hickman v Taylor*, *cert denied*, 327 U S 808 (1946), *reh'g granted*, 328 U S 876 (1946), *decided by*, 329 U S 495 (1947), *Boumediene v Bush*, *cert denied*, 549 U S 1328 (2007), *reh'g granted*, 551 U S 1161 (2007), *decided by*, 553 U S 723 (2008) A certification of counsel that this petition is presented in good faith and not for delay, and that the grounds for this petition are intervening circumstances of a substantial and controlling effect and other substantial grounds not previously presented, is annexed

GROUNDS FOR REHEARING

In the jungles of Vietnam during the war, Colonel DeAngelis ran a 440-bed Mobile Army Surgical Hospital (MASH) unit He treated and cared for thousands of young soldiers, and as the Chief Surgeon personally saved countless lives He was also awarded the Silver Star for Valor "Colonel" DeAngelis deserves better than what has been done to "Doctor" DeAngelis in this case Doctor DeAngelis has been deprived of due process and unfairly

mistreated by an obviously flawed, confused, prejudicial, and internally inconsistent Tax Court opinion that was summarily ignored by the Court of Appeals, and perhaps just as casually ignored by this Court as well

This Court must not allow this obviously flawed decision to stand because not only does it fly in the face of 80 years of black letter tax law, it is already being misused, miscited, and mischaracterized by the Commissioner in hundreds, if not thousands, of ongoing tax audits For example, the following cases that are currently in Tax Court, and that have over 40 additional cases coming behind them, have fallen victim to the Commissioner's misuse of the flawed opinion in this case *See, e g , Curcio v Commissioner*, Docket No 1768-07, *Jelling v Commissioner*, Docket No. 1769-07, *Smith v Commissioner*, Docket No 14822-07, *Mogelefsky v Commissioner*, Docket No 14917-07, *McGehee Family Clinic, Inc v Commissioner*, Docket No 15646-08, *Prosser v Commissioner*, Docket No 15647-08

Additionally, this Court should grant the petition for rehearing, vacate the decision of the Court of Appeals, and remand this case to the Court of Appeals for further remand to the Tax Court for a new trial based on the following reasons—all of which demonstrate how Dr DeAngelis and the other Petitioners were clearly denied due process

1 The Commissioner called a single solitary witness in support of his case, a purported expert who, at the time of his testimony, was being sued by the Sponsor and Administrator of the multiple employer welfare benefit plan at the heart of this case – the STEP Plan – for $30 million The lawsuit against the Commissioner's expert continues to this day In fact, this purported "expert" has recently

been retained to testify on behalf of yet another welfare benefit plan that competes against STEP and is very similar to STEP in many ways The Commissioner's only witness in and against Dr DeAngelis had a major conflict of interest then, and has now proven his conflicting opinions can be bought and sold for the right price It is impossible that the Commissioner's expert can now speak favorably of a different welfare benefit plan without further contradicting his already conflicted testimony regarding the STEP Plan in this case

2 Both the Tax Court and the Court of Appeals ignored the congressionally-mandated protection for taxpayers provided in 26 U.S.C § 7491 created by the *Internal Revenue Restructuring and Reform Act of 1998*, PL 105-206, 112 Stat 685, that requires, in all court cases arising from audit disputes after July 22, 1998, that the burden of proof shift from the taxpayer to the Commissioner That was not done in this case as is required by law Not only was that not done in this case, but instead the Tax Court granted the Commissioner's motion to strike the taxpayers' motion to shift the burden of proof to the Commissioner This failure of due process is an abuse of discretion that requires remand under this Court's powers and supervisory administration of the lower courts As such, this case provides the Court an excellent opportunity to review the parameters of congressional protection provided to the taxpayer by Section 7491, which is an issue of first impression for this Court

3 Similarly, the nebulous and extremely vague rules and regulations under 26 U S C § 419A(f)(6) should be reviewed by this Court Petitioner is only one of a thousand victims of the Commissioner's internally inconsistent rules and regulations applied to multiple employer welfare benefit plans as described under Section 419A(f)(6) This

case would have afforded the Tax Court and the Second Circuit a valuable opportunity to rule on the legitimacy of the Commissioner's flawed regulations under Section 419A(f)(6) Unfortunately, the decision here skirted and dodged all of the relevant tax issues presented and instead made up a minutiae-laden fairy tale that is not supported by the facts of this case or 80 years of black letter tax law

4 Finally, if allowed to stand, the decision in this case will effectively repeal all congressionally provided deductions for small businesses in the Tax Code because the Commissioner claims that *DeAngelis* stands for the principle that if a taxpayer wants to take a deduction for the contribution to a welfare benefit plan under 26 U S C § 162(a), 26 C F R § 1 162-10, or 26 U S C § 419(b), then the tax deduction will be denied simply because of the taxpayer's desire to make the contribution with tax-deductible dollars as allowed by the Commissioner's own booklet – *Treasury Publication 535, Business Expenses* – that is readily available on the Internet There are no less than seven listings of tax deductions for the purchase of insurance in the IRS booklet and several authorizing the deduction for contributions made to a welfare benefit plan It is an outrageous violation of fairness and equality under the law that the deduction was allowed for Quinn the Office Manager and millions of other Americans, but not for "Colonel" and now "Doctor" DeAngelis and the Petitioners

A highly respected doctor awarded the Silver Star by his country for valor under enemy fire deserves better from the Federal Courts than silence in the face of the overwhelmingly clear error in the Tax Court opinion and the national significance of these issues to all taxpayers

CONCLUSION

The Court should grant this petition for rehearing from the denial of certiorari

Respectfully submitted,

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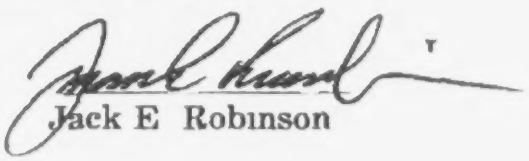
CERTIFICATE OF GOOD FAITH

The undersigned hereby certifies that this petition for rehearing is restricted to the grounds specified in Rule 44 2 of the Rules of the Supreme Court and is presented in good faith and not for delay



Jack E Robinson